THE

LAW REPORTS.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY W. MACPHERSON, ESQ.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PRIVY COUNCIL,

ESTABLISHED BY THE 3RD & 4TH WILL. IV., C. 41,

FOR HEARING AND REPORTING ON APPEALS TO HER MAJESTY IN COUNCIL.

1873–4.

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ERRATUM.

ge 114, line 13 from bottom, *for* "The Right Hon. Sir Robert P. Collier, *read* "The Right Hon. Sir Montague E. Smith."

GIRDHAREE LALL AND RUNJEET PANDY . APPELLANTS;

AND

KANTOO LALL AND OTHERS . . . . . RESPONDENTS.

J. C.*
1874
May 9.

MUDDUN THAKOOR . . . . . APPELLANT;

AND

KANTOO LALL AND OTHERS . . . . . RESPONDENTS.

EX PARTE.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

Ancestral property which descends to a man under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It is a pious duty on the part of the son to pay his father's debts, and the ancestral property in which the son, as son, acquires an interest by birth is liable to the father's debts, unless they have been contracted for immoral purposes. The Mithila law is the same. Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale. A son cannot, under the Mithila law, set aside the sale of ancestral property by his father for the discharge of the father's debt, and oust the purchaser.

Whether a son can under the Mitakshara law recover an undivided share of ancestral property sold by his father, *quære.*

A son is not entitled under the Mithila law to any interest in ancestral property sold by the father before his birth.

Where a Court of Justice has given a decree against a party in favour of a creditor, and has ordered certain property to be set up for sale in execution of the decree, a *bonâ fide* purchaser under the execution, who has paid the purchase-money, is not liable to have the property taken from him on the ground that the decree proceeded upon an erroneous view of the law.

THE first of these appeals was brought from a decree of the High Court, which reversed the decree of the principal Sudder Ameen of *Bhaugulpore.* The facts were as follows:—

The talookas *Nawalgawan* and *Akha Amanut Sarcar,* which

* *Present:*—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

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GIRDHAREE LALL v. KANTOO LALL.

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formed the subject of the appeal, were part of the self-acquired property of one *Kunhya Lall*, who died in the year 1842, leaving two sons, *Bhikharee Lall*, the elder, and *Bujrung Sahye*, the younger, then a minor, him surviving, as his joint heirs, according to the Mithila law. Upon the death of their father, *Bhikharee Lall*, as the elder son, became, and thenceforth continued to act, as manager of the joint family, both before and after the birth of his son, the Respondent *Kantoo Lall*, who always continued in all respects a member of the joint family.

The name of *Bhikharee Lall* in his own right, and also as guardian of his younger brother, was in due course entered in the collector's records, in place of that of their father, in respect of the lands belonging to him.

The two brothers became heavily indebted, and had granted bonds and other charges over their property, and were much pressed by their creditors; one of whom, having obtained a judgment against *Bhikaree Lall*, attached and advertised for sale his right and share in the family dwelling-house. Under these circumstances they, in 1856, sold the lands in dispute, and applied most of the money in discharge of their debts, including Government revenue.

In 1866 the first suit was instituted by *Kantoo Lall*, the son of the elder brother *Bhikharee Lall*, who was a minor at the time of the sale, and by the guardian of *Mahabeer Pershad*, the infant son of the younger brother, *Bujrung Sahye*, but born subsequently to the sale. It was brought against *Bhikharee Lall* and *Bujrung Sahye* and fourteen other persons (being the purchasers of the lands sold) as Defendants, to obtain possession of the lands as having been sold by the fathers of the Plaintiffs in excess of their rights under the Mithila law. The Plaintiffs alleged that the sale was made to pay debts incurred by the fathers through extravagance and immorality, and to provide funds for the like purposes, and to defraud the Plaintiffs of their rights in the property as sons.

The Defendants maintained that the fathers had not been guilty of extravagance or immorality; that the sale was not made to supply means for such purposes, but was made under urgent necessity to satisfy the judgment and execution, and other debts and liabilities of the joint family; and that some of such other debts

had been contracted to enable the fathers to purchase other lands for the joint family, which were added to the ancestral estate, and were, in fact, claimed as part of such estate by the Plaintiffs, while others of those debts were contracted in order that those two persons, as heads of the joint family, might be able to perform, in a proper manner, the funeral rites and marriage and other ceremonies of the various members of the joint family, and also to defray other expenses necessary for the support and requirements or comfort of the joint family, among which latter was specially mentioned the payment of the Government revenue aforesaid.

The suit being at issue the parties went into evidence, and the hearing of the suit took place before the Principal Sudder Ameen of *Bhaugulpore*, on the 31st of December, 1866, when he delivered his judgment, the most material parts of which are as follows:—

"The Plaintiffs had entirely failed to establish that the debts contracted by their fathers were for an immoral purpose; for the evidence adduced on their behalf in this case amounted to this, that their fathers lived a little beyond their means, inasmuch as they retained an expensive establishment, and were fond of good cheer. It is true that some of the witnesses have said that money was spent on dancing; but, from the peculiar habits of the people of this part of the country, spending a little money on festive occasions, to which this dancing was confined, is not reprehensible. Besides, it cannot be said of the father of the Konloo, *Moonshe Bhikaree Lall*, that he was either a simpleton or fool, who was led to a vicious course of life by the advice of needy dependents, as he was at first a Peishkar, and latterly Sheristadar of the Purneah Dewany Adawlut, a position in which he must have earned much to enable him to subsist comfortably and at ease. On these grounds the sales of properties which have been taken in execution of decrees, and by intervention of Courts, though for debts having their origin in extravagance, cannot be interfered with, as the sons are liable for such debts."

He also remarked that: "It appeared from the evidence of witnesses adduced on behalf of *Girdharee Lall* and *Runjeet Pandy*, that the talooka *Nawaganwan* was sold to them to satisfy the

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GIRDHAREE LALL v. KANTOO LALL.

MUDDUN THAKOOR v. KANTOO LALL.

decrees of *Baijnath Chuckerbutty*, &c; that immediately preceding the purchase of *Girdharee* the house of *Bhikharee* was advertised for sale, and in order to save their dwelling-house the two brothers *Bhikharee* and *Bujrung* sold the property. It was not denied by the pleader of the Plaintiff that *Jadopershad* and *Madhopershad* were the bankers of the brothers, and it appeared from their books that the whole of the consideration of *Nawaganwàn*, Rs.5150, was paid over to the bankers, and the greatest portion of this sum was applied to the liquidation of the decrees obtained against them. The entries on the debit side of their book are against the names of *Baijnath Chuckerbutty, Muddun Takoor*, decree-holders of *Tarachand*, and *Chumur Lall*, creditors. Besides the above there were also entries shewing that Government revenue was paid out of the money. It was true that the whole of the money was not spent for the purposes above indicated, yet as the application of the greatest portion is shewn to have been for purposes which must be considered as originating in a legal necessity, so this portion of the property must be considered as a valid one."

The Principal Sudder Ameen, therefore, found and decided adversely to the Plaintiffs, and in favour of all the Defendants, except in the case of one *Rajcoomar Singh*, and therefore in effect ordered that as against the Appellants and the other Defendants, except *Rajcoomar Singh*, the Plaintiff's suit should be dismissed with costs.

An appeal was brought to the High Court at *Calcutta*, which was heard before a Division Bench, composed of two Puisne Judges, on the 6th of April, 1868, when they pronounced their judgment, from which the following is an extract:—

"It is admitted that the Court must look to the Vivàda Chintamonee to ascertain the Mithila law current on this point, and passages in that commentary have been referred to in the course of the argument. It is clear that that commentary does not lay down the law on the point in the same precise terms as either the Mitakshara or the Dayábhága. We are not shewn that it is anywhere distinctly declared in the commentary, as it is in the Mitakshara, that the son's right to ancestral property accrues upon his birth, or that he is from his birth co-owner with his father in such

property, or that he can call upon his father at any time to divide such property with him. The son's rights in ancestral property are therefore not distinctly placed in such high terms by the Mithila law as by the Mitakshara. But there are passages in the chapter on partition of property during the lifetime of the father which certainly tend to the conclusion that the right of the father to deal with ancestral property in the lifetime of his son is limited. It is laid down that 'self-acquired property shall be divided equally or unequally, or not divided at all, according to the father's pleasure. The partition of such property depends entirely on his own will; for the sons have no ownership therein.' It is argued from this that there is certain property in which the sons have ownership, and that that property must be ancestral property. This passage would shew that whenever the right of the son may accrue, there is certain property in which the son has, even during his father's lifetime, an ownership; and looking to the analogy of the Hindu law as laid down in the Mitakshara, and to the admitted fact, that on points where the Vivâda Chintamonee is silent, the Mitakshara is to be taken as a guide, we think that that property is ancestral property which has devolved to the father and the son from the grandfather.

"But the question still remains, what description of ownership a son possesses in such property. If he is unable to compel his father to divide such property with him during his father's lifetime, his ownership, though inherent in him from his birth, may not actually come into force until his father's death. There is no direct clause in the Vivâda Chintamonee which allows a son to force his father to a partition of ancestral property in his father's lifetime. The clause above alluded to declares the father's power to divide his property among his sons during his lifetime, and points out that as regards certain property the father is his own master, and can act as he pleases. As regards ancestral landed property, he does not possess the same right, because the son has an ownership in such property. For the purposes of this suit, however, it is necessary also to determine at what time the ownership of the son commences, whether at his birth, or after a partition has been made either with the consent of the father or against his consent. The Vivâda Chintamonee not laying down

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any rule upon the point, we must decide this point also on the Mitakshara, and there it is laid down that the ownership accrues on the son's birth, and that the son and father are joint owners in such property from the son's birth; and it has been held by several benches of this Court, after some difference of opinion, that the son can compel his father to divide such property whenever he pleases. Applying these principles to this case, the sons may, we think, be considered in this case to be suing to obtain their share of their grandfather's property. The fathers are parties to the suit as Defendants, though, as they have alienated the estates, they do not oppose the sons. However repugnant at first sight it may appear to principles of justice and equity that the sons should be allowed to recover landed estates which the fathers have sold, still if the right of the father to sell any portion of such estate can be questioned under the law, and the right of the son to a portion of such estate is clear under that law, the sons must recover."

The Judges were also of opinion that there was no evidence to shew that the fathers required to raise money for any pressing necessity, for the benefit of the family, and while they held *Mahabeer* excluded by his birth having occurred after the sale, they awarded to *Kantoo Lall* one-half of his father's share.

The present Appellants severally obtained special leave to appeal to Her Majesty in Council.

The appeals now came on to be heard.

FIRST APPEAL.

Mr. *Leith*, Q.C., and Mr. *C. W. Arathoon*, for the Appellants:—

The question is whether the sale was made upon sufficient cause by *Bhikharee Lall* and his brother. We maintain that seizing the family dwelling-house was a sufficient cause, and that, even though there might have been improvidence in incurring the debt which necessitated the sale, the Court will not look further than to the immediate cause, where there has been pressure from without, as there was here on the part of the judgment creditor, and a necessity at the time of sale (1). There is not the slightest proof

(1) Suth. W. R. extra vol. (1864), pp. 153, 154; 14 Suth. W. R. 72.

of the debt being contracted for immoral purposes, and the purchase-money is shewn to have been applied to the redemption of the house and the repayment of money which had been expended in the purchase of land. If the rule is to be laid down as contended for, no property could ever be sold by people living under Mithila law.

The subject is noticed in the Vivâda Chintamonee [Ed. 1863], pp. 224, 229. The Mitakshara, c. 1, s. 1, para. 22, 27. The reasoning of the Mitakshara is, that the property is not vested in the son upon his birth, but that his right is inchoate. No distinction is there made between ancestral and self-acquired property. It may be alienated during the minority of the owner in order to avert calamity, if the transaction is such as a good manager would enter into: *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1). If the father were to alienate, not under such circumstances, the son might set aside the alienation as regards his own share. It appears that at Madras the Courts will sell the father's share in execution of a decree against him, but the Courts in Bengal will not.

In the Reports of the *Calcutta* Sudder Court for 1861, p. 220, there is a decision that the son must shew that the father's debt was illegal or was contracted for an immoral purpose if he seeks to set aside a sale made to pay the father's debt. In the present case the father of the Plaintiff *Kantoo Lall* is still alive, so that the Plaintiff is not entitled to possession.

Sir *Thomas Strange* (2) explains when the concurrence of the minor sons may be dispensed with, and says that partition cannot enforced during the father's life unless he is civilly dead, or falls be under one or other of various categories. The right of the son is only inchoate till then, though it may be that he might come in and prevent waste by the father.

And even if the money had been employed for an immoral purpose, the Indian Courts could not allow the purchaser to be ousted, but would at the very least allow the sale to stand good to the extent of the father's interest, although they do not allow him to bind more than his own interest, except where he acts as manager.

(1) 6 Moore's Ind. Ap. Ca. 393.

(2) Hindu Law, 2nd Ed., vol. i., pp. 19, 176, 177, 184, note 104.

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Where there has been a partition and the father gets a separate share, an after-born son gets only a portion of the father's share. A purchaser *bonâ fide* is not bound to shew an absolute necessity for the sale (1).

The evidence shews the indebtedness of the father, and also the application of the money, and the finding of the Principal Sudder Ameen is clear upon this point.

SECOND APPEAL.

Mr. *Leith*, Q.C., and Mr. *J. H. W. Arathoon*, for Appellant.

The facts of this case, so far as it is necessary to mention them, appear by the judgment, which deals with both appeals, and which was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit brought by *Baboo Kantoo Lall*, the son of *Bhikharee Lall*, and by *Mussummat Doolaro Koonwaree* on behalf of *Mahabeer Pershad*, the minor son of *Lalla Bujrung Sahye*, the said *Kantoo Lall* and *Mahabeer Pershad* being grandsons of *Moonshee Kunhya Lall*, deceased, against a number of different Defendants, who are wholly unconnected with each other, to recover possession from them of certain portions of land which belonged to the ancestral estate. The first appeal arises out of the suit so far as it related to the first set of Defendants, *Baboo Girdharee Lall* and *Runjeet Pandy*, to recover possession of talooka *Nawaganwan* and *Akha Amanut Sarcar* in pergunnah *Chayen*, and to set aside a deed of sale which was executed by the fathers of the two Plaintiffs, dated the 28th of July, 1856. The fathers are both made Defendants in the suit; and it is stated by one of the witnesses, and is probably the fact, that *Bhikharee Lall*, the father of *Kantoo Lall*, is in reality the person carrying on the suit. The suit was brought to set aside the deed of sale executed by the two fathers, and to recover possession of the whole property,—not the particular shares of the sons, even if the sons could be said in a case like the present to have had distinct and separate shares. The Principal Sudder Ameen dismissed the suit. The High Court set aside that decision, and awarded to the Plaintiff, *Kantoo Lall*,

(1) 1 Suth W R. 96, 2 Suth. W. R. 292; 6 Suth. W. R. 149.

one half of his father's share,—that is, one half of an eight annas share; but as to the other Plaintiff, *Mahabeer Pershad*, the minor son of *Bujrung Sahye*, they held that he was not entitled to recover, inasmuch as he was not born at the time when the deed of sale was executed. In respect of that portion of the decision no appeal has been preferred.

The property is situated in the *Mithila* district, and is governed by the Mithila law, which is very similar to the law administered under the Mitakshara. With reference to the Mitakshara upon this point, it may be well to read from the 11th *Moore's* Privy Council Cases, p. 89, a portion of the judgment which was delivered by Lord *Westbury* in the case of *Appovier* v. *Rama Subba Aiyan*, before the Judicial Committee. He says: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or receiver of the rents a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves, with regard to a particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

It is probable that on account of this case, and on account of a decision in the High Court (1), this suit was brought by *Kantoo Lall* and *Mahabeer Pershad* not for the purpose of recovering their respective shares, because they had no distinct or definite shares to recover, but to recover the whole property upon the ground that

(1) 12 Suth. Weekly Reporter, Full Bench Cases, 5.

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the sale by the fathers was void, and that the whole property which the fathers had conveyed ought to be brought back again to be joint property for the benefit of the whole family. It is questionable whether a son can, under the Mitakshara law, recover an undivided share of ancestral property sold by his father (1). But it is unnecessary to determine that question in the present case, because their Lordships are of opinion that, looking to the circumstances of this case, the Plaintiff was not entitled to recover any portion of the estate as regards the first two Defendants.

It appears that the deed of sale was executed on the 28th of July, 1856. At that time a decree had been obtained against *Bhikharee Lall* at the suit of *Baijnath Chuckerbutty*, upon a bond executed by *Bhikharee* in his favour, and an execution had issued against him, upon which his "right and share" in the dwelling-house belonging to the family had been attached. It was therefore necessary to raise money to pay the debt of *Bhikharee Lall*, the father, and to get rid of the execution, whatever the effect of it might be.

The property descended from *Kunhya Lall*, who died in the year 1250. The eldest of the two Plaintiffs, *Kantoo Lall*, was not born until 1251. So that upon the death of *Kunhya Lall*, the property descended to *Bhikharee Lall* and *Bujrung Sahye* as his two sons, and they were the only persons interested in the property at that time. There can be no doubt that if they had contracted a debt at that time, the property which descended to them from their ancestor would have been liable to pay it. But it is said that they could not sell the property, because in 1251, before the deed of sale was executed, *Kantoo Lall* was born, and, by reason of his birth under the Mithila law, he had acquired an interest in that property.

Now it is important to consider what was the interest which *Kantoo Lall* acquired. Did he gain such an interest in this property as prevented it from being liable to pay a debt which his father had contracted? If his father had died, and had left him as his heir, and the property had come into his hands, could he have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts? In the case which has been

(1) 12 Suth. Weekly Reporter, Civil Rulings, 478.

referred to in argument of *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) Lord Justice *Knight Bruce*, who delivered the judgment of the Privy Council, says, "Though an estate be ancestral, it may be charged for some purposes against the heir for the father's debt by the father, as indeed the case above cited from the sixth volume of the decisions of the Sudder Dewanny Adawlut, North-Western Provinces, incidentally shews. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt." That is an authority to shew that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts. The rule is, as stated by Lord Justice *Knight Bruce*:—"The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which had come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shewn that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money, upon which an action was brought. The bond had been substantiated in a Court of Justice; there was nothing to shew that it was given for an immoral pur-

(1) 6 Moore's Ind. Ap. Ca. 421.

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pose; and the holder recovered a decree upon it. There is no suggestion either that the bond or the decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested, and nothing proved. On the contrary, it was proved that the purchase-money for the estate was paid into the bankers of the fathers, and credit was given to them with the bankers for the amount, and that the money was applied partly to pay off the decree, partly to pay off a balance which was due from the fathers to the bankers, and partly to pay Government revenue; and then there was some small portion of which the application was not accounted for. But it is not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate, and to recover possession of it with mesne profits. This he is endeavouring to do after the purchaser has been in possession for a period of ten years; for the purchase was completed in 1856, and the suit was not brought until 1866, when the son says that the right of action accrued to him upon his attaining his majority. Even if there was no necessity to raise the whole purchase-money the sale would not be wholly void.

It appears, therefore, to their Lordships that the Plaintiffs are not entitled to set aside the deed of sale; that the judgment of the Principal Sudder Ameen with regard to it was correct, and that the High Court were mistaken in upsetting that decision, and awarding to the Plaintiff one-fourth of the estate, as being one half of the share of his father.

In addition to the case in the Privy Council, there is a case in the Sudder Court, of *Mussumat Junnuk Kishoree Koonwur* v. *Rughoonundun Sing*, reported in the Bengal Sudder decisions of 1861; in which it was held that it was necessary for the son, in order to set aside the sale of property for the purpose of paying the father's debts, to shew that the debt was illegal or contracted for an immoral purpose. The passage is at page 222. It is there said, "The sales for the reversal of which the present suit is brought divide themselves into three classes: first, sales made by order of Court in execution of decrees; secondly, sales made privately to

satisfy decrees and bonds; and thirdly, sales made simply in order to raise money for some purpose or another. Freedom on the part of the son, as far as regards ancestral property, from the obligation to discharge the father's debts under Hindu law can be successfully pleaded only by a consideration of the invalid nature of the debts incurred, Now we are clearly of opinion that the Plaintiff has been unable to shew that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these), immoral, and such as under Hindu law the son would not be liable for."

It appears, therefore, to their Lordships that the Plaintiff certainly is not entitled to set aside this deed; and if he were so entitled, it is very doubtful whether he has any particular share in this property of which he is entitled to recover possession. It is unnecessary, however, for their Lordships to decide anything with regard to that point, inasmuch as they hold that the Plaintiff is not entitled to set aside the deed of sale.

THE SECOND APPEAL is by *Muddun Mohun Thakoor*. He is the fourth Defendant in the suit which was brought against him to recover possession of five annas share in mouzahs *Rajpore* and *Alinuggur*, &c. It appears that *Muddun Mohun Thakoor* purchased at a sale under an execution of a decree against the two fathers. He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favour of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and therefore it appears to their Lordships that he was perfectly justified, within the principle of the case which has already been referred to, in 6th *Moore's* Indian Appeal Cases, in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate. At page 423 of the report, Lord Justice *Knight Bruce* says:—"The power of the manager for an infant heir to charge an estate not his own is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the pre-

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cedent mismanagement of the estate. The actual pressure on the the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause." The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shewn that if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, were liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having inquired into that, and having *bonâ fide* purchased the estate under the execution, and *bonâ fide* paid a valuable consideration for the property, the Plaintiffs are not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the Defendant. It appears to their Lordships, therefore, that the decision of the Principal Sudder Ameen as regards this portion of the case was also correct.

Under these circumstances their Lordships will humbly recommend Her Majesty that the judgment of the High Court, so far as it relates to the two portions of the estates purchased by the Appellants in these two appeals, respectively, be reversed, and that the decision of the Principal Sudder Ameen with regard to them be affirmed, and that the Respondents do pay to the Appellants respectively their costs in the High Court, and their costs of these appeals.

Solicitor for the Appellants in both cases: *T. L. Wilson.*

RAJAH SRI CHAITANYA CHUNDRA HARISCHANDANA JAGADEVU BAHADOOR } APPELLANT;

AND

THE COLLECTOR OF GANJAM, ON BEHALF OF THE GOVERNOR OF FORT ST. GEORGE, AND SRI NARAYANA MAHARAJA DEVU, ZEMINDAR OF KOLLI KOTA . . . . . } RESPONDENTS.

J. C.*
1874
June 4, 5.

On Appeal from the High Court of Judicature at Madras.

The talook of a zemindar was sold in 1854 for arrears of revenue, and possession was given to the purchaser in 1855: it was subsequently represented by the zemindar to the Government that fifty of the villages had been sold wrongfully, inasmuch as they were mocassa villages, which had been alienated from the zemindary and paid a quit-rent only to the zemindar. In 1860 the Government ordered an annual payment to be made to the ex-zemindar by way of compensation; but he did not accept it, and he sued in 1868 for the recovery of the villages:—

Held, that more than twelve years having elapsed since the sale and the dispossession, the Act XIV. of 1859 was a bar to the suit, notwithstanding the transactions between the Government and the ex-zemindar.

THIS was an appeal from a judgment and decree of the High Court of Judicature at *Madras*, dated the 15th of February, 1871, affirming the decree and judgment of the Civil Court of *Berhampore*, in that presidency, dated the 22nd of June, 1869, dismissing the Appellant's suit with costs, on the ground that it was barred by the *Statute of Limitations*.

The suit was instituted by the Appellant as the adopted son of the late Zemindar of *Adugadda*, or *Hautghur*, against the Collector of *Ganjam*, and *Sri Narayana Maharaja Devu*, Zemindar of *Kolli Kota*, to recover the possession of fifty villages, with mesne profits.

The Appellant's allegations were these:—

That the Appellant's adoptive father, and his ancestors, from time immemorial, were absolutely entitled to, and possessed of, the

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, AND THE RIGHT HON. SIR LAWRENCE PEEL.

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talook or zemindary. This zemindary, like all others, consisted of lands paying full assessment to Government, and lands paying merely a quit-rent. The zemindary of *Adugadda* comprised 202 villages, 152 of which were of the former class, and 50 of the latter, commonly known as mocassa jaghire villages, which had been, and were, the private property of the Appellant's father and his ancestors long before the Permanent Settlement, and were held by them on mocassa tenure, and were not subject or liable to pay peshcush to Government, but only kattubadi or quit-rent.

That previously to 1854 the Appellant's father having allowed the peshcush, or Government kist, due on the talook to run into arrear to the amount of Rs.39,000, the talook was advertised for sale by the Government for the payment of the arrears; and accordingly, in July, 1854, the talook was put up for sale by auction by the collector, the first Respondent; and the second Respondent was declared the purchaser at the price of Rs.151,000. But pending the orders of the Government on the circumstances of the sale, it was not put into the possession of the purchaser until the end of 1855.

That during this period the talook remained under attachment, and was, in 1855, made over to the second Respondent by the collector in the state in which it was managed during the time of its attachment; consequently the second Respondent took possession of the entire estate, including the fifty villages; and the Appellant's father having claimed the villages, the Respondent refused to restore them to him, alleging that they were not unlawfully taken possession of, but that they became the second Respondent's by purchase at the Government sale on the 12th of July, 1854, along with the talook.

That between the period of sale and 1858, the Appellant's father petitioned the Board of Revenue, the Government, and the Court of Directors, to cancel the sale, in consequence of its injustice; the amount due being only Rs.39,000, which could easily have been realised by the sale of a few villages, whereas the whole estate, worth 14 lacs, was attached and sold for Rs.151,000, to the great loss and ruin of the ex-zemindar.

That having failed in his endeavour to induce the Court of

Directors to restore the talook to him, the ex-zemindar, in 1857, preferred his petition to the Board of Revenue, claiming the fifty villages, and praying for their restoration, on the ground that, being held on mocassa jaghire tenure, they could not lawfully have been included in the sale, and were not sold, and so could not have been purchased by the second Respondent, and that he was therefore unlawfully put into possession thereof.

That the Board of Revenue, having considered the claims of the ex-zemindar, in 1858, arrived at these conclusions:—

"In the latter part of his statement, the ex-zemindar distinctly and accurately sets forth the relative rights of the present zemindar and of the holders of alienated lands, under whatever designation they are found. The present zemindar, as is justly observed by the ex-zemindar, is entitled to that only which is settled on the proprietor by the Istimrar sunnud, viz., the entire assessment of jeroyaty villages, and the kattubadi or quit-rent of alienated lands, where such has been fixed. The proprietor is entitled to any increase from augmented sources in consequence of the occupation of waste lands in the former class of villages; but however much alienated tenures may be improved, the rights of the proprietor, as such, are limited to the quit-rent only. . . . .

"These villages are noticed both by the collector and the ex-zemindar as mocassa or jaghire: both terms have the same meaning, and signify an assignment of the Government's share of the produce for a specific purpose, whether personal, for subsistence, or for the support of any public establishment, particularly of a military character. The term 'mocassa' is generally used in the northern circars to imply grants of land for the support of peons. In *Ganjam*, Mr. *Knox* states, it includes the private landed property of the ancient zemindars, and grants for good service and distinction.

"The Board have already stated that the possession of the fifty villages in question should be made over to the ex-zemindar, subject to the payment of the fixed quit-rent of Rs.19,612 to the present proprietor of the estate, the second Defendant [who agreed to receive the quit-rent in a memorandum addressed to the collector]. They resolve to recommend to Government that this course may be followed, provided he will consent to forego

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all claims to the difference between the quit-rent of the fifty mocassa villages and the sums actually collected from them by the present Zemindar of *Hautghur*, whom the Board agree with the collector in wishing to relieve from refund under the particular circumstances of the case."

That in Minutes of Consultation, dated the 6th of December, 1858, the Government remark :—" The Government are now asked to decide whether the present or the late proprietor is entitled to the villages, and the Board then recommend that the 50 villages may be given up to the ex-zemindar on condition that he foregoes any demand against the *Kolli Kota* zemindar for the mesne profits. . . . . The Government are of opinion that, of the two proprietors, the ex-zemindar is clearly entitled to the mocassa villages."

That the Government then resolved to resume the villages, and make an annual payment to the ex-zemindar equal to the average of ten years' receipts from them, and at the same time suggested that they might be made over to the second Respondent for a proportionate increase to his peshcush, or exchanged for a number of villages of equal value, compactly lying within one of the Government talooks, and the collector was required to submit an early report upon the practicability of the plan adverted to. But no sum was agreed to be paid to the ex-zemindar, nor any villages to be exchanged previous to his death.

That on the death of the ex-zemindar, on the 4th of July, 1859, the Appellant was a minor, and continued so until the 2nd of October, 1865.

That after the death of the ex-zemindar, the Government, in an order, dated the 21st of February, 1860, fixed as the amount of annual profits the sum of Rs.5000 a year; and in the Minutes of Consultation of the 21st of February, 1860, ordered that the villages should be made over to the second Respondent, Rs.5000 being added to his peshcush. They were accordingly afterwards made over to the second Respondent, and were now in his possession.

That neither the Appellant's father, nor his adoptive mother and guardian, nor the Appellant, consented to receive anything under this arrangement.

On the 28th of September, 1868, the Appellant instituted the present suit for the recovery of the villages.

It was admitted by the Appellant that from the date of sale neither his father nor he had ever returned into possession of those villages, nor exercised any act of ownership over them; and that the second Respondent took the landlord's share of the crops in them in 1855, and had ever since been continuously in bodily possession of them.

The Respondents urged that the suit became barred in May, 1867, if not in July, 1866; whereas the plaint was not presented until September, 1868. For, they asserted, the Government, whether rightfully or wrongfully, in July, 1854, sold, and the second Respondent bought, all the rights which the Appellant's adoptive father then possessed over every part of the talook. Thus, the right of action, if any, arose on the day of sale, in July, 1854, or at any rate on the Government placing the second Respondent in possession of the talook, in May, 1855. And twelve years, the period of limitation, would thus terminate either in July, 1866, or in May, 1867. They contended that the proceedings subsequent to the sale did not affect the running of the *Statute of Limitation.*

The following was the judgment of the High Court of *Madras,* affirming the judgment of the Civil Judge of *Berhampore:*—

"It is conceded by Mr. *Sloan* and Mr. *Mayne* (who were counsel for the Appellant) that there had been ouster from the land since 1854, and no payment of rent-charge since that time. The negotiations going on are maintained by them to interrupt the running of the time. Clearly decided in the *Bengal Salt Case* that they do not (*East India Company* v. *Oditchurn Paul* (1)). We dismiss the appeal with costs."

Mr. *Cowie,* Q.C. (with him Mr. *S. G. Grady*), for the Appellant:—

The Courts below were in error in holding that the suit was barred by the *Statute of Limitation,* Act XIV. of 1859. The cause of action did not arise in 1854, when the talook was sold, nor in 1855, when it was delivered into the possession of the present zemindar; for the Government have admitted that the villages

(1) 5 Moore's Ind. Ap. Ca. 43.

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were not sold in 1854, as they intended to sell only that which they had the power to sell, namely, the kattubadi. The cause of action did not arise until the Government decided to resume the villages and actually put the second Respondent in possession of them, in 1860. The second Respondent, by agreeing to pay the additional peshcush of Rs.5000, admitted that the villages had not been included in his purchase, except in respect of the kattubadi; so that the resumption of the villages, in 1860, was the cause of action. Moreover, if we assume that the sale took place in 1854, and that the second Respondent was put in possession in 1855, nevertheless, the Government, by their subsequent proceedings, cancelled the sale, and committed a new tort by delivering possession to the second Respondent in 1860.

Mr. *Forsyth*, Q.C., and Mr. *H. C. Merivale*, for the first Respondent; and Mr. *Leith*, Q.C., and Mr. *J. B. Norton*, for the second Respondent, were not called on.

At the close of the argument, the judgment of their Lordships was delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

This is a very clear case. Both the Courts in *India* have decided that the claim of the Plaintiff is barred by the limitation of twelve years. He brought his suit, as the adopted son of the late Zemindar of *Hautghur*, to recover fifty villages which had belonged to the talook of *Hautghur*. That talook was sold by the Government for arrears of revenue. It is alleged by the second Defendant, who was the purchaser, that the fifty villages were sold with the rest of the talook. It is alleged on the part of the Appellant that those villages, although in some sense belonging to the talook, ought not to have been sold by the Government, inasmuch as they were not subject to revenue, but were mocassa villages, which had been alienated from the zemindary, and paid a quit-rent only to the zemindar. That is the question upon the merits, if the merits could be tried. The sale was in 1854. The second Defendant was put into actual possession of the villages in 1855, and has remained in possession ever since. This suit was

not brought until the 28th of September, 1868, which is more than twelve years after he was so put in possession. *Primâ facie* therefore, the *Statute of Limitation* is a bar. Mr. *Cowie* has endeavoured to shew that a fresh cause of action arose in consequence of some proceedings of the Government, by which it is said they made a new grant of these villages to the second Defendant, the present zemindar, at an increased revenue of Rs.5000. But such a grant, supposing it to have been made, would not give a new cause of action, and cannot affect the time when the only cause of action arose to the present Appellant. The Appellant is suing under the title he had in 1854 and 1855, and he has no other title, and he does not allege that he has had any possession, or that the Government has given him possession since his first dispossession. It is quite unnecessary, therefore, to go into those proceedings, into which Mr. *Cowie* went in some detail, for the purpose of raising the point. It is sufficient to say that all that passed between the Government and the second Defendant, the present zemindar, does not at all affect the question of limitation. The bar applies if the cause of action has not arisen within twelve years. It is quite clear here that it did not arise within that period, and therefore the judgments of the Courts in *India* are right.

Their Lordships will humbly recommend Her Majesty to affirm the judgment of the High Court of *Madras*, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Frank Richardson & Sadler.*

Solicitors for the first Respondent: *Lawford & Waterhouse.*

Solicitors for the second Respondent: *Gregory, Rowcliffes, & Rawle.*

J. C.* 1874 June 9.

TOONDUN SINGH . . . . . APPELLANT;

AND

POKHNARAIN SINGH, TELUKDHAREE SINGH, AND RAM PERSHAD SINGH AND BISHEN PERSHAD SINGH (THE TWO SONS OF KASHEE SINGH, DECEASED) . . . . RESPONDENTS.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

A purchase at a sale for arrears of revenue under Act I. of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act; and the members of the joint family can sue to enforce rights acquired by them under such a purchase, as against the managing member, though he is the sole certified purchaser.

Where, after appeal brought, the Court below has passed a judgment in review in the same case, which has been sent up and notified to Her Majesty in Council, and put on record in the appeal case, it is open to the Judicial Committee to pass judgment on the appeal, without prejudice to the subsequent judgment which was passed on review.

THIS was an appeal against a judgment and decree of the High Court of *Calcutta*, dated the 20th of April, 1870, which affirmed the decree of the Judge of *Patna*, dated the 15th of September, 1868.

The suit was instituted by *Kashee Singh* and the two Respondents, *Pokhnarain Singh* and *Telukdharee Singh*, as the sons of three deceased brothers of the Appellant.

They sought, by their suit, a declaration of their right to the possession of certain shares in mouzahs (villages), lands, houses, &c., alleged as to one portion to have been their original joint ancestral property, and as to another portion to have been derived by purchases at various times, made with the alleged profits of such ancestral property, and while the several members of the family continued joint; and they assigned 1861 as the date of the

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

cause of action, when, as they alleged, a separation from commensality took place.

By way of defence, the Appellant contended that the several members of the family completely separated in 1835, soon after the death of *Omrao Singh*, the common ancestor: that on such separation the then joint property was partitioned and divided, and that thereafter separate collections of the rents were made by the several separate owners; that the Appellant then attached himself to the great *Patna* banker (*Meer Abdollah*), with whom and his family he soon became a favourite; that through his agency estates were farmed out to respectable tenants, whereby he received gratuities and presents; and aided with loans, and being an expert man of business he increased his pecuniary means; and as fortune aided him he purchased *Mouzah Bazeedpore* and other mouzahs, particularly specified, out of his own separate moneys.

The Appellant further contended as to certain of the estates, that they were purchased by him at different times at public auctions for arrears of Government revenue, and that, independently of all other considerations, he could not be evicted from the possession of such estates, being the statutory certified purchaser thereof.

The Judge of *Patna* and the High Court of *Calcutta* held that the Appellant had not satisfactorily proved the separation in 1861, and gave the Respondents a decree for the property claimed.

The arguments that were now adduced before the Privy Council were ultimately limited to the question as to whether the suit ought not to have been dismissed under sect. 21 of Act I. of 1845 (1), inasmuch as the Appellant was the certified purchaser of the property.

With regard to this, the High Court had held as follows:—

"The case of a purchaser at a sale for arrears of Government

(1) Sect. 21 of Act I. of 1845 is as follows:—

"And it is hereby enacted that any suit brought to oust the certified purchaser as aforesaid, on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

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revenue made by the manager of a joint Hindu family in his own name on behalf of the joint family, does not appear to be expressly provided for by sect. 21 of Act I. of 1845, and it would only be by a forced construction that such a case could be brought within the terms of that section. The section is a penal one, and should, we think, be construed strictly. . . . I think it must be taken as found as a fact, that the purchase of *Mokeshpore* was made by *Toondun Singh* as a managing member of the joint family, on behalf of himself and the other members of the family. The suit is not brought against *Toondun Singh* on the ground that the purchase was made on behalf of *another* person, and *not* of himself. The purchase was, in fact, admittedly made by him on his own behalf, though others may be interested with him. The suit is not brought to oust him, but to establish the rights of his co-sharers as joint owner with him. . . . On the whole, we are of opinion that a purchase at a sale for arrears of revenue under Act I. of 1845, made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act, and that, notwithstanding anything contained therein, the members of such joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser."

The appeal was preferred and admitted in the High Court on the 14th of May, 1870, and after it had been so admitted, and on the 5th December, 1871, a further judgment was delivered by the same division bench, upon an application for review preferred by the present Appellant, which the Appellant afterwards caused to be included in the Record. The object of that application was to raise a wholly new issue, viz., whether, assuming the properties in suit to be joint, as alleged by the Respondents, the Appellant should not be declared entitled to a larger share, inasmuch as he had devoted more labour and skill to the acquisition of those properties than his brothers or nephews had done.

An opinion was expressed by the Court, in their judgment on review, that a further inquiry would be necessary on that point, in case the Judicial Committee should affirm the former judgment of the High Court.

Mr. *Leith*, Q.C., and Mr. *C. W. Arathoon*, for the Appellant, contended that the proper construction of the 21st section of Act I. of 1845 would include the purchase at a sale for arrears of revenue under that Act made by the managing member of a joint Hindu family, if the purchase were made in his own name, though it might be on behalf of the joint family; and that, consequently, under that 21st section, this suit ought to have been dismissed.

Mr. *Doyne*, for the Respondents, maintained that the view of the High Court was accurate as to the 21st section not applying to this purchase. He also submitted that the present appeal would not affect the judgment made by the High Court on review subsequently to the preferring the appeal.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The point in this case has been reduced now to the question as to what is the proper construction to be put upon the 21st section of Act I. of 1845. The High Court expressed their opinion "that a purchase at a sale for arrears of revenue under Act I. of 1845 made by the managing member of a joint Hindu family in his own name, but on behalf of the joint family, is not affected by the 21st section of that Act, and that notwithstanding anything contained therein the members of such joint family may sue to enforce rights acquired by them under such a purchase as against the managing member, though he is the sole certified purchaser." Their Lordships entirely concur in that view of the construction of Act I. of 1845. It appears upon the record that this judgment was pronounced on the 20th of April, 1870, and that the appeal was preferred and allowed to Her Majesty in Council on the 14th of May, 1870. The judgment in review which has been sent up and notified to Her Majesty in Council, and put upon the record in this case, was passed on the 29th of August, 1871, after the appeal was preferred. It does not appear that any appeal has been preferred against the judgment which was pronounced in review; and under those circumstances their Lordships, being aware that such a judgment has been passed, will humbly recom-

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mend Her Majesty to affirm, with the costs of this appeal, the original decree passed by the High Court, so far as it finds the properties in question to be part of the joint family estate, but without prejudice to the subsequent judgment which was passed by the High Court in review, or to any proceeding which may be taken thereunder. That will leave all the questions open as to carrying it out.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondents: *J. H. & H. R. Henderson.*

J. C.* 1874 *June* 2.

ALEXANDER WATSON, MANAGER TO THE ESTATE OF CURRIE & CO. . . . . } APPELLANT;

AND

AGA MEHEDEE SHERAZEE, MIRZA MAHOMED ALLY SHERAZEE, AND HADJEE MIRZA HOSSAIN SHERAZEE . . . . } RESPONDENTS.

On Appeal from the Court of the Recorder of Rangoon.

An agreement between a principal and his agent commenced with an admitted balance, and clearly contemplated the existence of an account current containing mutual items of debit and credit. The agreement contained a stipulation that on the adjustment of the accounts the principal should be bound to pay such balance as might be found due from him. The account was kept accordingly as a continuous account, and contained several items which brought down the mutual dealings to March, 1868. The agent sued in February, 1871, to recover the balance due to him on the account:—

Held, that the case fell within the 8th section of Act XIV. of 1859, and was not barred by limitation, even as to the items which were dated more than three years before the institution of the suit.

In a suit for an account it was ordered by consent of the parties that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of certain merchandise, or the value of such merchandise, delivered, or otherwise, with full powers for the purposes of the investigation; and that if

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* *Present:*—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, AND THE RIGHT HON. SIR ROBERT P. COLLIER.

questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court :—

Held, that this reference was different from the ordinary reference to a commissioner to examine accounts under Art. 181 of the *Code of Civil Procedure*.

Whether it would be competent to the Court to re-open a question of account against a clear finding upon a question of fact relating to the accouut and made by the commissioner upon the evidence properly before him, *quære*.

THIS was an appeal against the judgment of the Recorder of *Rangoon*, in an action brought by the Appellant, as manager of the estate of Messrs. *Currie & Co.*, against the Respondents, to recover Rs.40,067, being the alleged balance of an account due from the Respondents to Messrs. *Currie & Co.*

The balance was alleged by the Appellant to have become due in the mutual dealings between the Respondents and Messrs. *Currie & Co.*

The Respondents were partners carrying on business at *Rangoon*, as timber merchants, &c.; and Messrs. *Currie & Co.* were a company carrying on business at *Rangoon* as merchants and agents, and they acted as the agents of the Respondents.

On the 17th of May, 1867, the following articles of agreement were entered into between the Respondents and Messrs. *Currie & Co.*:—

"1. The said parties, *Mirza Mahomed Ally Sherazee*, *Hadjee Mirza Hoossain Sherazee* and *Aga Mehedee Sherazee*, hold and are jointly interested in permits from the Government of *British Burmah*, in the forest department, entitling them to fell, drag, and remove seasoned timber from the *Kimboung* and *Gwai-Thay* forests, until the 1st day of April, 1869, in the case of the *Kimboung Forest*, and the 30th day of November, 1868, in the case of the *Gwai-Thay Forest*, and in exercise of the powers conferred upon them by such permits, the said parties have already brought down to, and stored in *Rangoon*, large quantities of timber from the said forests, and other large quantities are in course of transit to *Rangoon* from the said forests, and other large quantities are still in the said forests, felled and awaiting removal, or ready to be felled and removed as opportunities shall offer.

"2. The said *Mirza Mahomed Ally Sherazee*, *Hadjee Mirza Hoossain Sherazee*, and *Aga Mehedee Sherazee*, are, and hereby

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admit themselves to be, indebted to the said Messrs. *Currie & Co.* in the sum of forty-four thousand rupees, and for the purpose of securing repayment of that sum, with such other sum or sums as may from time to time be advanced by or otherwise become due to the said Messrs. *Currie & Co.*, and for the further purpose of securing to the said Messrs. *Currie & Co.* due payment of all bills of exchange or promissory notes which may be by them made, drawn, accepted, or executed, or to which in any way they may become parties under this agreement, and also all arrears of interest and commission to which the said Messrs. *Currie & Co.* may become entitled under the articles hereinafter contained, they, the said *Mirza Mahomed Ally Sherazee, Hadjee Mirza Hoossain Sherazee,* and *Aga Mehedee Sherazee,* agree and bind themselves in manner following:—

"3. They agree to appoint, and they hereby do appoint, Messrs. *Currie & Co.* as their agents for the sale of all the timber aforesaid, hereby empowering them as such agents to demand and obtain delivery of all such timber, both such as has already arrived in *Rangoon,* amounting to eight hundred and fifty logs, or thereabouts, which is now stored on the premises of *Aga Mahomed Ismail & Nanabhoy Burjorjee,* and such timber as is now lying in the *Poozondoung Creek* or elsewhere, in course of transit from the said forests to *Rangoon,* and also all such timber as is still awaiting removal from the said forests, all of which timber is now marked, or shall be marked, with the distinguishing letters MA or RMA.

"4. They bind themselves not to sell, directly or indirectly, any portion of the said timber and not to appoint any other agents, or agent, for the sale thereof, and not in any way to obstruct Messrs. *Currie & Co.*, as such agents as aforesaid; hereby further binding themselves to pay to the said Messrs. *Currie & Co.*, as such agents, commission or brokerage at the rate of 5 per cent. on the gross value of all such sales or sale as may be effected by them as such agents as aforesaid.

"5. To secure the delivery to Messrs. *Currie & Co.* of the timber yet to arrive from the forests aforesaid, it is agreed that all passes for the same to be taken out at the *Shwe-gyen* station of the forest department, shall be taken out in the name of Messrs. *Currie & Co.*, and it shall, if required by them, be marked with their mark.

"6. The said parties hereto of the first part shall have no power to terminate or revoke the agency hereby conferred on Messrs. *Currie & Co.* without in the first place giving six months' previous notice in writing of such their intention, and fully satisfying all claims of the said Messrs. *Currie & Co.*, whether in respect of moneys advanced, or of liabilities undertaken, or of commission or interest accruing to them as such agents as aforesaid.

"7. Out of the money to be received by them as the proceeds of any sales or sale to be effected by them as such agents as aforesaid, it shall be lawful for the said Messrs. *Currie & Co.*, and they are hereby empowered, firstly, to defray all costs and charges of such sales or sale, and, secondly, to deduct and pay themselves all such sum or sums of money as may from time to time become due to them with their commission or brokerage at the rate aforesaid, and also with interest at the current bank rate.

"8. It shall be lawful for the said Messrs. *Currie & Co.*, and they are hereby empowered, in their discretion, to ship and despatch for sale to some other market such timber as shall come into their possession as such agents as aforesaid, and such shipment and despatch shall be at the cost and charges of the parties hereto of the first part.

"9. Upon an adjustment of accounts between the parties hereto, the said *Mirza Mahomed Ally Sherazee, Hadjee Mirza Hoossain Sherazee*, and *Aga Mehedee Sherazee* agree and bind themselves to pay to the said Messrs. *Currie & Co.* such balance as may be then found due to them, and to grant bills, payable three months after date thereof, for the same, and execute such other legal assurance as may be reasonably required; and as collateral security for such payment, and also to secure the performance by them of the articles hereinbefore contained, they hereby deposit with the said Messrs. *Currie & Co.* the Government permits hereinbefore mentioned, and agree that the said Messrs. *Currie & Co.* shall have a lien upon the said permits for all sums of money now due or to become due to them under this agreement.

"10. And on their part, the said Messrs. *Currie & Co.* bind themselves faithfully to discharge their duties as such agents as aforesaid, and to account for all such timber and sums of money as may be received by them in such capacity.

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"11. It is lastly agreed by and between the said parties hereto, that if any dispute or difference shall arise touching these presents, the same shall be inquired into and decided by two indifferent persons, and in case of their disagreement, by their umpire; and if either party shall fail to appoint a referee for the space of ten days after notice shall have been given him by the other party so to do, the referee appointed by the other party may make a final decision alone."

Pursuant to the agreement, Messrs. *Currie & Co.* from time to time made advances to the Respondents for the purpose of working certain forests situate in *British Burmah*. The firm of *Currie & Co.* also indorsed and accepted from time to time, on behalf of the Respondents, bills and promissory notes for the purpose of enabling the Respondents to discount the same in the local banks, and these acceptances and promissory notes at maturity, Messrs. *Currie & Co.* were obliged to retire.

Previously to the execution of the agreement, the Respondents had also dealings with Messrs. *Currie & Co.*, commencing from December, 1866.

Messrs. *Currie & Co.* having become insolvent, the Appellant was, on the 17th of March, 1870, duly appointed manager of their estate, with power to sue on behalf of certain attaching creditors for the properties attached.

In February, 1871, the Appellant commenced this suit; and the usual preliminary pleadings and steps in the cause having been taken, it was on the 5th of April, 1872, ordered by consent that the case should be referred to a commissioner to take accounts.

The following was the order of the Recorder:—

"To Mr. *Lockie*, of *Rangoon*.

"Whereas it is deemed requisite for the purposes of this suit that a commission for the investigation of the accounts should be issued,

"You are hereby appointed commissioner for the purpose of taking accounts, and in taking accounts you are to decide upon all questions of fact, whether as to the delivery of timber, or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation, and if questions of law arise and cannot be

settled or disposed of before you, they are to be submitted to the Court, and to report to this Court on or before the 17th day of May, 1872.

"Process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application."

This order was apparently made under sect. 181 of the *Civil Procedure Code*, which directs "That the proceedings of the commissioner shall be received in evidence in the case, unless the Court may have reason to be dissatisfied with them, in which case the Court shall make such further inquiry as may be requisite, and shall pass such ultimate judgment or order as may appear to it to be right and proper in the circumstances of the case."

The commissioner accordingly sat for the purpose of making these investigations, and ultimately made his report, in which he stated the conclusion at which he had arrived:—

"From the result of my examination, it appears to me that the Defendants are indebted to Plaintiff in the sum of Rs.24,898. 11*a*. 5*p*., and it is a question for the Court to decide whether the commissions on renewals, &c., amounting to Rs.9,796. 6*a*. 9*p*., are due by the Defendants as a fair charge on the account; also no further deliveries of timber than appears in *Currie & Co.'s* account have been proved by the Defendants. Mr. *Elmes*, counsel for the Defendants, it will be seen from the proceedings, reserved several objections in law, to which I would beg to refer the honourable Court."

He then set out the account and the evidence of the witnesses, and concluded with the objections taken before him by Mr. *Elmes*, the advocate of the Respondents:—

"Mr. *Elmes* reserves the following objections in law for the decision of the Court.

"1st. That *Currie & Co.'s* accounts have not been proved lawfully, and cannot therefore be received in evidence as to any fact.

"2nd. That the deed of 17th May, 1867, marked exhibit A, is not binding as against the second and third Defendants, since no

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authority under seal from either of them to execute it has been proved or shewn.

"3rd. Mr. *Elmes* reserves all questions as to limitation affecting the several items charged for the consideration of the Court."

When the suit again came on before the Recorder in July, 1872. the objections of the Respondents were heard. On this occasion the question arose whether or not the Appellant's claim was barred by the 9th clause of sect. 1 of Act XIV. of 1859, which prescribes three years as the period of limitation in suits for money lent, or for breach of contract, &c.; and whether or not *Currie & Co.'s* accounts had been lawfully proved, when although attested copies of the company's books had been produced, Mr. *Nichol*, the clerk of the company, who had kept the books, was not produced as a witness, though he was in *Rangoon* at the time of the trial.

The Recorder held that the accounts of Messrs. *Currie & Co.* had not been lawfully proved, and that consequently the indebtedness of the Respondents had not been shewn, and he dismissed the suit.

This judgment of the Recorder of *Rangoon*, which was now appealed from, was delivered on the 21st of August, 1872, and was as follows:—

"A great many difficult questions have arisen in this suit. The original agreement of the 17th of May, 1867, seems to have been partly in the nature of a security for money due, and future advances, and partly an agency contract. It may be questioned whether some of the stipulations in it are not invalid, as tending to oppression, where the relation of mortgagor and mortgagee subsists between the parties; but I do not think it necessary to enter upon that question. The mode in which the agreement was executed is canvassed by the second and third Defendants, as they never gave authority to the first Defendant to execute a document under seal. But I do not see how that can affect the matter; for the second and third Defendants admit that the agreement was made on their behalf, and the affixing of a seal would not affect their liability or immunity under it.

"It seems to be true that the accounts previous to the 17th of May, 1867, were accounts with the first Defendant only; and,

therefore, if the Rs.44,000, mentioned in the agreement of that date, are deducted from the balance claimed by the Plaintiff, there would be nothing due as against the second and third Defendants. The plea of limitation raises a more doubtful point; for the entries since the close of 1867 are disallowed, or withdrawn, or are, with one exception, merely entries of payments which *Currie & Co.* were bound to make without recourse to the Defendants, and can, therefore, hardly be considered as entries keeping the account open as against the Defendants; the one exception being an entry in March, 1868, of the sum of Rs.7,658, credited to the Defendants as the nett proceeds of timber sold the 17th of February, 1868, more than three years before the institution of the suit, though it is difficult to say when the financial year closed. The first Defendant states, in evidence, that the entries in his account, which differs from the account filed by the Plaintiff, were set down according to what was told him by *Currie & Co.*, and that three rafts of timber were received by *Currie & Co.*, the particulars of the sale of which were never given him. This brings me to the most important point raised by the Defendants, viz., that, even as regards the first Defendant, the accounts filed with the plaint have never been legally proved. It was said in argument for the Defendants, and not contradicted, that the person who kept the accounts for *Currie & Co.*, Mr. *Nicol*, is now in *Rangoon*, and might have been called as a witness. The *Indian Evidence Act* of 1855, sect. 43, supplies the rule that books proved to have been regularly kept in the course of business, shall be admissible as corroborative, but not as independent, proof of the facts stated therein. In the present case, the account books having been taken to *Calcutta* for a legitimate purpose, the Plaintiff files attested copies of them; and these attested copies are, I think, good secondary evidence of the contents of the books; but, even if the books themselves had been produced, some original evidence would have been requisite before they could have been admitted as corroborative proof. There is, however, no original evidence of any part of the accounts, except fourteen promissory notes produced in evidence before the commissioner. The 39th section of the *Evidence Act* says that an entry, which would be admissible after the death of the person who made it, on the ground of its having been made in

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the ordinary course of business, shall be admissible, though the person who made it be not dead, if he is at the time of the trial or hearing beyond the reach of the process of the Court, or cannot, after diligent search, be found. The entries in one of the cash-books are proved to have been made by Mr. *Nicoll* up to the 31st of March, 1868. Another cash-book is, up to a certain point, only a copy of the book last mentioned. It goes on to July, 1869; but, with the exception of one item, nothing beyond the 31st of March, 1868, can relate to the account between *Currie & Co.* and the Defendants, that is not entered in the former book; and the entry of that one item, as already shewn, would be in favour of the Defendants. It appears from the evidence of Mr. *Stanley*, that Mr. *Gair* was in charge of the *Rangoon* branch of the firm from about the end of 1866 till the beginning of 1869. He left *Rangoon* in July, 1869, and then Mr. *Duke* took charge. So, then, during the period covered by the accounts, Mr. *Gair* was in charge of the firm in *Rangoon*. If any of the entries were made by him, and some of those in the cash-book marked B are stated to have been made by him, they have not been pointed out. Even if they had been pointed out, and I were at liberty, as perhaps I am, to follow the practice of the Court of Chancery in *England* (1), in permitting books of account to be taken as *primâ facie* evidence of the truth of the matters therein contained, yet I should hardly think fit so to do where the accounts are so doubtful as these. When the report of the commissioner was under discussion, I remarked upon one item disallowed by him which, unexplained, it seemed to me to have been scarcely consistent with common honesty to have set down against the Defendants; and some other items are little better. There is some degree of evidence, too, that *Currie & Co.* received three rafts of timber from the Defendants which have not been accounted for. It is necessary, therefore, to have recourse to stricter rules in deciding upon the accuracy of the accounts; and I think that the account books themselves, even if proved (which they were not) to have contained entries in the handwriting of Mr. *Gair*, should not be admitted as *primâ facie* proof. On the whole, therefore, as there is neither direct evidence of the truth of the accounts, beyond the fourteen promissory notes, nor such

(1) See Act VII. of 1872, s. 7.

primâ facie evidence of the truth of them as can be received; and, as the admission, on the other side of the account, of sums received goes far beyond the aggregate amount of the fourteen promissory notes, I must hold that the indebtedness of the Defendants has not been proved, and that the suit must be dismissed; but, as the Defendants' accounts have been very carelessly kept, without costs."

Mr. *Joseph Brown*, Q.C., and Mr. *F. Meadows White*, for the Appellant:—

The Recorder held that the Appellant's claim had not been proved, inasmuch as the accounts of *Currie & Co.* were not lawfully proved, and they would, if proved, have been only corroborative evidence of the contents. The claim, however, did not require the corroborative evidence of the accounts, for there was sufficient independent evidence to prove it. Moreover, the accounts were sufficiently proved; for the 43rd section of the *Indian Evidence Act* of 1855, when referring to books proved to have been regularly kept, does not mean that they are to be proved by producing the man who made the entries.

With regard to the *Statute of Limitations* being a bar to the Plaintiff's claim, there are some entries in March and May, 1868, which are clearly within three years of the 28th of February, 1871, when the suit was commenced. And although the account was one between principal and agent, yet it was a continuous account within the 8th section of Act XIV. of 1859 (1), which relates to "suits for balances of accounts current between merchants and traders who have had mutual dealings." Thus, the continuous account having been kept open until within three years, the Appellant's claim was not barred. At any rate, the claim must be allowed in respect of the entries made within the three years.

It was not competent to the Court to re-open any of the questions decided by the commissioner. There was not a mere

(1) Act XIV. of 1859, s. 8: "In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings: such year to be reckoned as the same is reckoned in the accounts."

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reference to the commissioner for his opinion. There was a binding agreement to abide by his decision. He was an arbitrator, in much the same way as if he had been appointed in accordance with the provisions of the 312th article of the *Code of Procedure*.

Mr. *Leith*, Q.C., Mr. *Cowie*, Q.C., and Mr. *Doyne*, for the Respondents:—

If the books of the company had been produced, and if Mr. *Nicoll*, who made the entries in them, had been called, then the books would have been proved, and there would have been corroborative evidence of the entries in them; but it would have been only corroborative evidence; however, even this was not done, and there was not this corroborative evidence. And as to the independent evidence that was adduced, it was not sufficient. However, we say that the entries, if proved, would have been in our favour.

With regard to the reference to the commissioner, it was not a reference to an arbitrator under the 312th clause of Act No. VIII. of 1859, but was a mere reference under clause 181. It was, therefore, just like a reference in former times to a Master in the Court of Chancery. The Court, therefore, had power either to act or to refuse to act on the opinion of the commissioner.

As regards the *Statute of Limitation*, the suit is one merely by the representative of agents to recover from their principals the balance due on the agency account, and consequently does not come within the 8th section of Act XIV. of 1859, which relates only to "merchants and traders who have had mutual dealings." If any of the items are within three years of the commencement of the suit, yet the others are not, and in respect of these the statute is a bar to any suit.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:—

The question raised by this appeal is, whether any, and if so, what amount is due from the Respondents, who are either general partners as timber merchants at *Rangoon*, in the province of

Pegu, or were engaged as co-adventurers in the working of the forests in that country, to the late firm of *Currie & Co.*, which carried on business as merchants and agents at *Rangoon*, and apparently also at *Moulmein*.

The question arose between the Respondents and the Appellant, who had been appointed the manager under the provisions of sect. 243 of Act VIII. of 1859, with power to sue on behalf of certain judgment creditors of *Currie & Co.* who had attached the debt, if any, due from the Respondents to *Currie & Co.* *Currie & Co.* appear to have afterwards become insolvent, and their books to have passed into the hands of their general assignee, but it must be presumed that at the date of their insolvency the Plaintiff's title, under the attachments, to the debt, if any, had already accrued. The suit was commenced on the 28th of February, 1871. It appears by the proceedings that the course of dealing between the Respondents and *Currie & Co.* was regulated, at all events after that date, by the agreement of the 17th of May, 1867. It is impossible, their Lordships think, to read that agreement without coming to the conclusion that the course of dealing between *Currie & Co.* and the Respondents was the ordinary course of dealing between principal and agent; *Currie & Co.* being often in advance on account of their principals; and being, on the other hand, responsible for the proceeds of the timber sent down from the forests to them for the purpose of sale, and sold by them. The agreement, which starts with an admitted balance of Rs.44,000, clearly contemplates the existence of an account current between the two firms containing mutual items of debit and credit. The 9th clause of it contains a distinct stipulation that on the adjustment of the accounts the Respondents shall be bound to pay such balance as may be then found due from them. That was the state of things so long as these mutual dealings subsisted.

The suit having been brought on the 28th of February, 1871, the Defendants put in written statements. The first and second Defendants put in a joint statement, and the third Defendant put in a separate statement. They do not materially differ, except that the two last Respondents on the record raised a point which is now no longer insisted upon as material, namely, that the

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agreement having been executed only by the first Defendant, though under powers of attorney by them, they were not bound by it as by an agreement under seal. All the Respondents admitted that they were generally bound to *Currie & Co.* by the agreement, and also that something, though a sum very far short of the Rs.44,000, which was claimed by the Plaintiff, might be due to *Currie & Co.* on the balance of the account. The only issues that were settled in the suit were, first, whether the claim of the Plaintiff had been rightly made by regular suit, a question which has since been treated as immaterial; and secondly, what amount, if any, was due by Defendants to Plaintiff on the cause of action alleged in the plaint. That being the state of the record, the parties on the 5th of April, 1872, agreed by their counsel that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of timber or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court. And the formal commission issued on the 19th of April to Mr. *Lockie*, the commissioner, by the Court, stated, "You are hereby appointed commissioner for the purpose of taking accounts, and in taking accounts you are to decide upon all questions of fact, whether the delivery of timber, or the value of timber delivered, or otherwise, with full powers for the purposes of the investigation; and if questions of law arise and cannot be settled or disposed of before you, they are to be submitted to the Court, and to report to this Court on or before the 17th day of May, 1872."

The commissioner so appointed appears to have made a careful investigation, and the result of his report was this:—He says: "From the result of my examination it appears to me that the Defendants are indebted to Plaintiff in the sum of Rs.24,898. 11*a*. 5*p*., and it is a question for the Court to decide whether the commissions on renewals, &c., amounting to Rs.9796. 6*a*. 9*p*., are due by Defendants as a fair charge on the account; also no further deliveries of timber than appears in *Currie & Co.'s* account have been proved by the Defendants. Mr. *Elmes*, counsel for the Defendants,

it will be seen from the proceeding, reserved several objections in law, to which I would beg to refer the Honourable Court."

The question with reference to these commissions may be at once dismissed from consideration, because there is no longer any contention raised on the part of the Appellant that they ought to have been allowed; and the question now to be determined is simply whether the commissioner's report, which finds the sum of Rs.24,898. 11*a.* 5*p.* to be the amount due, is to be upheld or not.

The points of law taken by Mr. *Elmes* are stated in the record in these words: "1st. That *Currie & Co.'s* accounts have not been proved lawfully, and cannot therefore be received in evidence as to any fact; 2nd. That the deed of the 17th of May, 1867, is not binding as against the second and third Defendants, since no authority under seal from either of them to execute it has been proved or shewn; 3rd. Mr. *Elmes* reserves all questions as to limitation affecting the several items charged for the consideration of the Court." Their Lordships think that it will be convenient to deal first with these questions of law, and to take them in their inverse order.

The contention as to limitation seems to have been that the suit having been commenced on the 28th of February, 1871, the Plaintiff's claim was barred, at least as to many items of the account, by the clause of Act XIV. of 1859, which prescribes a three years' limitation for suits for breaches of contract, money lent, and the like. It is unnecessary to consider whether after the consent order referring the question to the investigation of the commissioner, nothing having been said in the written statements about the claim being barred by limitation, and no issue on that point having been settled, the objection was not taken too late. For their Lordships are of opinion that the Plaintiff's claim does not fall within the three years' limitation. It appears to them that it would be a misapplication of the law to treat the claim as barred as to some, and valid as to other items of the account. They are of opinion that the account was one continuous account between principal and agent, with debits and credits on each side of it, and that the contract was to pay the balance of that account when it should be struck: and that the case therefore falls within the 8th section of Act XIV. of 1859, there being several

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items which bring the mutual dealings down to March or May 1868. Therefore the objection that has been taken on the ground of the *Statute of Limitation* cannot prevail.

With respect to the second point raised by Mr. *Elmes*, that has not been insisted upon at the Bar to-day, and it is unnecessary for their Lordships to say more about it.

The other objection seems to be that upon which the decree of the learned Recorder of *Rangoon* is founded. It is, "That *Currie & Co.*'s accounts have not been proved lawfully, and cannot, therefore, be received in evidence as to any fact." In order to see whether the learned Judge was right in dismissing the suit on this ground, it is necessary to consider more particularly what was the course of the proceedings before the commissioner.

He acted in this way: he first took the evidence of one of the Respondents—*Aga Mehedee Sherazee*—who after several meetings and under an order of the commissioner produced the accounts of his firm. He also took the independent evidence of the bill collector of the *Bank of Bengal*, who produced certain promissory notes, fourteen in all, made by the Respondent *Aga Mehedee Sherazee*, and indorsed by *Currie & Co.*, and proved that those fourteen promissory notes had been taken up and paid by *Currie & Co.* As to every other item of the charge which the commissioner has allowed, he, upon the examination of *Aga Mehedee Sherazee*, and on the accounts produced by him as the accounts of his firm, found that they tallied with the like items in the books of *Currie & Co.*

In fact, the claim of the Plaintiff was proved wholly independently of *Currie & Co.*'s accounts, by those two witnesses and the accounts of the *Sherazees*. In one part of his judgment the learned Recorder states, and states correctly, that the accounts of *Currie & Co.* would have been, under the *Indian Evidence Act*, merely corroborative evidence. It follows therefore that the real result of his finding is, that inasmuch as by reason of the non-calling of the clerk who had made some of the entries, those accounts had not been satisfactorily proved and made corroborative evidence, he was bound to reject all the independent evidence,—that evidence which is the real foundation of the commissioner's finding,—and to come to the conclusion that the Plaintiff had

failed to substantiate his case. That is a decision which cannot be supported.

Their Lordships desire also to observe that even if the learned Recorder had the power, which is a question afterwards to be considered, to go into these questions of fact, and had on sufficient grounds come to the conclusion that the commissioner's finding was based upon evidence improperly received, it would have been his duty to send the case back for further investigation rather than to dismiss the suit altogether; since even upon the accounts of the *Sherazees* which were in evidence, it appears that at least Rs.4000 odd were due from them to the firm of *Currie & Co.* In their Lordships' view, it is unnecessary to consider whether the accounts might not have been treated as properly before the commissioner by way of corroborative evidence—whether, as Mr. *Brown* argued, it was not sufficient to shew that they were accounts regularly kept in the course of business, although the clerk who made particular items, and who might have been called, was not called to verify those items.

This being their Lordships' view upon the question on which the decision of the Court below has principally turned, the only remaining question is whether there are sufficient grounds upon which the *Sherazees* can, so to speak, surcharge the account as found by the commissioner, by taking credit for the sum of Rs.14,000, being the last item in the account shewn by their books, and also for the supposed value, a value which can only be ascertained by subsequent investigation, of three rafts of timber alleged to have been received by *Currie & Co.*, for the proceeds of which, if they ever sold them, they have never accounted. The commissioner has found, as a fact, that no further deliveries of timber than appears in *Currie & Co.'s* account had been proved by the Defendants; and this raises a material question as to the powers of the commissioner, and the effect to be given to the consent order under which it was referred to him to take the accounts. It is contended on behalf of the Respondents that the reference must be taken to be not a reference to him as an arbitrator, but a mere reference under the 181st article of the *Code of Procedure*, by which the Court is empowered to direct a commissioner to investigate the accounts and to make a report with which the Court can

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afterwards deal, treating it merely as evidence. It appears, however, to their Lordships that this particular reference, though not in the form of a reference for the final determination of a cause by an arbitrator, according to the provisions of the 312th and following articles of the *Code of Procedure*, is something higher than and different from the ordinary reference to a commissioner to investigate accounts under Article 181. In the first place it is made by consent, and the parties are bound by that consent, whatever may be the true construction to be put upon the order. A consent to such a reference under Article 181 does not appear to be made necessary by the Code. Nor can their Lordships construe the terms of the orders of the 5th and 19th of April, 1872, as importing anything but the agreement of the parties; and it was by no means an unreasonable agreement, that the commissioner, who was probably more conversant with mercantile accounts than the learned Judge, should decide the questions of fact, reserving any question of law which might arise to be disposed of by the Court. There is no proof upon the record of a formal exception taken to his finding upon any question of fact. The objections are all founded on matters of law, or on the improper reception of evidence, and of those objections their Lordships have already disposed.

Their Lordships, for these reasons, would feel very great difficulty in reopening, and would think it was hardly competent to them to reopen this question, against a clear finding upon a question of fact relating to the account and to the delivery of timber by the commissioner upon the evidence properly before him. But even if this were otherwise, they are by no means satisfied that there are grounds in the present case upon which they would be justified in directing any further investigation on this point. The claim rests on the evidence of *Aga Mehedee Sherazee*, and that evidence cannot, in their Lordships' opinion, be treated as satisfactory proof of the further delivery of timber to *Currie & Co.*, or of their receipt of the proceeds of that timber, or of their failure to account for such proceeds. On his first examination he said: "I was also told by them," he does not say by whom, "that Rs.14,000 had been realised for timber on my account in January, 1868. There were also three rafts of timber delivered to *Currie & Co.*

by the second Defendant, which do not appear in my books. I cannot speak personally as to the delivery of these rafts to *Currie & Co.* I made entries in my books from what *Currie & Co.* told me, not from accounts rendered by them." After the accounts were filed, he was again examined, and he then said, as to the first item: "I delivered 350 logs of timber to *Currie & Co.* in 1867, and they sold them in the month of January 1868. The proceeds are entered in my account filed on the 18th of February, 1868. I made the entry on my return from *Toungoo* at that time, according to the value of the timber, but I received no account sales. I cannot give any information about the three rafts of timber sent down from *Toungoo* by *Mirza Mahomed Ally.*" On re-examination he said: "I delivered the 350 logs of timber to Mr. *Gair.* They were not delivered on account of any private transactions with Mr. *Gair.* Mr. *Gair* was acting on behalf of *Currie & Co.* I never got receipts for the timber delivered to *Currie & Co.* *Currie & Co.* ordered the 350 logs of timber to be taken to *Aga Mahomed Ismails Bankshall.*" The account, which he produced, contains this item: "For 350 logs of timber sold privately by Mr. *Gair* at *Aga Mahomed Ismails Bankshall,* January 1868, Rs.14,000." Therefore as to the principal item, the only item in respect of which any ascertained amount is claimed, there is nothing but this loose evidence of the Respondent himself as to the delivery of the timber, and of his having been told by somebody connected with *Currie & Co.* that they had sold that timber; and that latter statement seems to be inconsistent with what he afterwards says, viz. that he made the entry on his return from *Toungoo,* according to the value of the timber.

It seems to their Lordships that if that transaction had really taken place, if 350 logs of timber had been delivered at *Rangoon* to *Currie & Co.*, and had been afterwards taken to or sold at *Aga Mahomed Ismails Bankshall,* it would have been easy for the Respondent to produce corroborative evidence of those facts, and that upon his unsupported testimony the commissioner was perfectly justified in treating that item as unproved. It is to be further remarked that the accounts which were sent by the official assignee have no bearing at all upon that item; because, as Mr. *Cowie* has shewn, they, for some reason or other, purported only to

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give the debit side of the account, and did not purport to shew the sums which had been received by *Currie & Co.* from the *Sherazees.* Again, as to the three rafts of timber, *Mirza Mahomed Ally,* who is said to have sent them down, was not called. There was no evidence whatever of the receipt of these three rafts of timber by *Currie & Co*, and their Lordships think the commissioner was justified in finding that there was no proof of their delivery.

Under these circumstances their Lordships think the judgment under appeal cannot be supported, and it will be their duty to advise Her Majesty to reverse that judgment, and to direct that in lieu thereof a decree be made in favour of the Appellant for the sum found due by the Commissioner, viz. Rs.24,898 11*a.* 5*p.*, with the costs of the suit below and the costs of this appeal.

Solicitors for the Appellant: *Linklater, Hackwood, Addison, & Brown.*

Solicitors for the Respondents: *Harrison, Beal, & Harrison.*

J. C.* 1874 *June* 12, 13; *July* 3.

THE MADRAS RAILWAY COMPANY . . APPELLANTS;

AND

THE ZEMINDAR OF CARVATENAGARUM RESPONDENT.

On Appeal from the High Court of Judicature at Madras.

Where it is the duty of the zemindar to maintain the tanks on his zemindary, which are part of a national system of irrigation, recognised by the laws of *India* as essential to the welfare of the inhabitants, and the banks of a tank are washed away by an extraordinary flood without negligence on his part:—

Held, that the zemindar is not liable for any damage that may be occasioned by the overflow of the water.

Fletcher v. *Rylands* (1) distinguished.

THIS was an appeal from a judgment and decree of the High Court of *Madras*, dated the 15th of February, 1871, affirming a

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

(1) Law Rep. 3 H. L. 330.

decree and judgment of *C. G. Plumer*, Esq., Acting Judge of the Civil Court of *Chittoor*, in the Presidency of *Madras*, dated the 26th of September, 1870.

The Appellants, who were the Plaintiffs in the suit, were the *Madras Railway Company.*

The Respondent, who was the Defendant, was *Streemun Mahamundavaswamai Katauri Salvah Meakarajoo Voomthay Raja Maharajah Coomara Vencataperoomal Rajoo Bahadoor Thara Maharajooloo Gauroo,* Zemindar of *Carvatenagarum,* in the district of *North Arcot.*

The suit was brought to recover the sum of Rs.45,000, as the aggregate alleged amount of damage said to have been sustained by the Appellants, by reason of injuries done in the years 1865 and 1866 to a portion of their railway, and to certain portions of the works connected therewith, and by reason of their losing a certain amount of traffic; the damage alleged was produced by the bursting and consequent escape of the water of two ancient tanks situate in the Respondent's zemindary.

A portion of the Appellants' line of railway, to a length of about thirty-one miles, runs through the zemindary of *Carvatenagarum;* and they alleged that on the 5th of December, 1865, a tank called the *Puttoor Tank,* situate on the west side of their line of railway, and in the Respondent's zemindary, burst, and the water which escaped therefrom rushed with violence through the breach thereby made and against the embankment of the railway, and completely carried away a bridge, part of the line of railway, consisting of three fifteen-feet arches, together with twenty yards of the embankment. Also, that on the same 5th of December, 1865, another tank, called the *Coyempetta Tank,* in the zemindary of *Carvatenagarum,* burst, and the water which escaped therefrom flooded a large area of country to a considerable depth, and coming in contact with the line of railway, carried away two bridges, part of such line of railway, leaving breaches in the embankment of the railway forty-six yards and forty yards in length respectively. The water so escaping, by coming in contact with several culverts, part of the Appellants' works connected with their railway, more or less injured the same. Further, that on the 10th of October, 1866, the *Coyempetta Tank* again burst, and the water which

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escaped therefrom rushed with such violence through a bridge, part of the railway, that the revetment of the abutment of the bridge was considerably injured. Moreover, that by reason of these breaches in the railway, public traffic over the same was more or less impeded, and the Appellants had thereby sustained damage.

The Respondent submitted (amongst other things) that "if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequences of '*vis major*,' or the act of God. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated, and the practice of storing water in such tanks in *India*, and particularly in this district and in the zemindary of *Carvatenagarum* and the adjacent districts, is lawful and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country. The Plaintiffs did not take proper care to prevent the occurrence of the thing complained of, and they must be held to have taken upon themselves the risk of damage happening. The Respondent could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people which also burst at the same time. . . . All the three tanks above the *Puttoor Tank* were breached, and the channels could be traced by which the waters had flowed from one tank to another into the *Puttoor Tank*, and the same with regard to the tanks above *Coyempetta*, with one exception, while the highest tank was breached and in an unfinished or badly finished state."

It seems to have been clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and that for seventeen or eighteen hours before the accident there was a tremendous downpour of rain. Some of the witnesses said that

they had not known such a fall of rain for twenty years; and one of the Appellants' witnesses admitted that from the time the breaches occurred until the Sunday before his examination, *i.e.*, for a period of nearly five years, he had never seen such a downpour. It seemed pretty clear that it was this continuous heavy downpour of rain that caused the tanks to burst.

The Appellants alleged that if the tanks had had properly constructed calingulahs, or outlets for the overflow of water, they would not have burst.

The Respondent, on the other hand, contended that the calingulahs used by him in these tanks were such as were used in tanks generally in that part of the country, and according to the usage and custom of the district; and that he had taken every reasonable and proper precaution to prevent the occurrence of ordinary accidents.

Mr. *C. G. Plumer*, the Acting Judge in the Civil Court of *Chittoor*, gave judgment for the Respondent. In his judgment he said (*inter alia*):—

"The Defendant urges that Plaintiffs constructed the railway long subsequent to the construction of the Defendant's tanks, which have existed from time immemorial, and that, therefore, the Plaintiffs took the land subject to the continuance of the existence of the tanks.

"It was clearly proved that the tanks in question have existed from time immemorial, and no doubt the Plaintiffs were well aware of their existence. The Plaintiffs, however, do not seek to interfere with the existence of the tanks, and, in my opinion, it cannot be held that the Plaintiffs were bound to protect themselves against the bursting of the Defendant's tanks. I do not think it necessary to refer to the several cases cited on the breach by Defendant's counsel on this point, considering the nature of the High Court's judgment referred to above.

"The chief question to be decided is, did the Defendant use every precaution to prevent the tanks on his estate from bursting and doing injury to his neighbour? Here it will be necessary to see what is the evidence in the case as to the cause of the tanks bursting.

"It is quite clear from the evidence of the third witness for the

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Plaintiffs, that when the Plaintiffs' three railway bridges were destroyed, the water from the *Puttoor* and *Coyempetta Tanks* had burst the natural boundaries of those tanks and overflowed down to the railway. It also appeared from the evidence of the third witness, and of the second witness (Mr. *Scott*), that above the *Puttoor Tank*, there are three tanks, and that above the *Coyempetta Tank* there are several tanks of various sizes.

"Mr. *Scott* and the fourth witness inspected all these tanks in February, 1866, the *Coyempetta* and *Puttoor Tanks* having burst in December, 1865, and they then found that all the three tanks above the *Puttoor Tank* were breached, and that they could trace the channels by which the waters had flowed from one tank to the other into the *Puttoor Tank*, and the same with regard to the tanks above *Coyempetta*, one of which, however, was not breached, while the highest tank was, the witness said, breached and in an unfinished or badly finished state.

"There is no evidence whatever to shew whether the tanks above the *Coyempetta* and *Puttoor Tanks* were breached in December, 1865, or when they were breached; some of the larger tanks had regularly constructed calingulahs, while the smaller tanks had mud dams.

"The *Puttoor* and *Coyempetta Tanks* had each a calingulah.

"It was suggested, though it was not distinctly proved, that the cause of the breaching of the *Puttoor* and *Coyempetta Tanks* was an extraordinary flow of water from the tanks above them, and this, it would appear from the tahsildar's reports I. and II., might have been the immediate cause of the disaster. The tahsildar, however, admitted that he had not seen those tanks at the time of the breaches, but he said that he saw the water coming from the direction of the tanks above *Puttoor* to the *Puttoor Tank*.

"The Plaintiffs urge that if all these tanks had had properly constructed calingulahs they would not have burst, and that the Defendant, not having taken the precaution to construct such calingulahs, is responsible for his neglect.

"The Defendant's case was that the Defendant had taken every reasonable and proper precaution to prevent the occurrence of ordinary accidents, and that he was not liable for an extraordinary accident such as he alleges this to have been.

"Now, in my opinion, the present case is distinguishable from the case of *Fletcher* v. *Rylands* (1) so often referred to.

"The reservoir referred to in that case had been constructed for the Defendant's own purposes, for his own benefit and advantage.

"In this case the Defendant's tanks, which have been in existence for ages, exist not for the benefit of the Defendant alone, but for the benefit of thousands of his ryots; 4000 guntahs of land are irrigated by the waters stored in each of these tanks, and as one of the Defendant's witnesses said, 'How could the people live if there were no waters in those tanks?'

"The existence of these tanks is absolutely necessary, not only for the beneficial enjoyment of the Defendant's estate, but for the sustenance of thousands of his ryots.

"Looking, then, at the enormous benefit conferred on the public by these tanks; considering that, in this district at least, their existence is an absolute and positive necessity, for without them the land would be a wilderness and the country a desert. Considering these things, I think that it would be inequitable to impose upon the owners of the lands, on which these tanks are situated, a greater obligation than to use all ordinary precaution to prevent the water from escaping and doing injury to their neighbours.

"The cases of *Blyth* v. *Birmingham Waterworks Company* (2), and *Withers* v. *North Kent Railway Company* (3), appear to be on all fours with the present case; and in both of these cases, as the works were sufficient for ordinary occasions, the Defendant was held not bound to provide against extraordinary accidents.

"I have now to determine whether the Defendant did use reasonable and proper precautions to guard against all ordinary accidents. I am of opinion that he did; it is not to be expected that you would find these tanks constructed on the most approved scientific principles, or furnished with the latest known works to provide for the escapement of the water. In not one of a hundred of the Government tanks would you find calingulahs constructed on the best known principle. How then is it to be expected that Defendant should make use of those appliances in the construction

(1) Law Rep. 3 H. L. 330. (2) 25 L. J. (Ex) 212.
(3) 27 L. J. (Ex.) 417.

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of his tanks. It was proved by the evidence of the Defendant's ninth witness that the tanks of *Puttoor* and *Coyempetta*, and those above them, had all either calingulahs or earthen dams, and that these calingulahs and earthen dams are in ordinary use throughout the whole district, and are considered perfectly sufficient for all ordinary occasions, and it appears to me that greater precaution could not properly be looked for from the Defendant.

"'Negligence,' Baron *Alderson* said, 'consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party.'

"Applying that definition to the present case, I am of opinion that Defendant did all that a reasonable man in his position and with his education and opportunities could have been expected to have done for the proper storing of the water in these tanks, and that he did not omit to take any reasonable precaution.

"And now to decide whether the bursting of the tanks was an ordinary or extraordinary accident.

"It is clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and that for seventeen or eighteen hours before the accident there was a tremendous downpour of rain, some of the witnesses said that they had not known such a fall of rain for twenty years, and the Plaintiffs' third witness admitted that from the time the breaches occurred until the Sunday before his examination he had never seen such a downpour, *i.e.*, for a period of nearly five years.

"I have no doubt whatever that it was this continuous heavy downpour of rain that caused the tanks to burst, and that the accident was an extraordinary one, against which the Defendant was not bound to provide.

"And here I would refer again to the two cases previously cited by me. In *Blyth* v. *Birmingham Waterworks Company* (1) the apparatus for supplying the street with water, constructed according to the best known principles, was so acted upon by a frost of unusual severity as to cause it to become inoperative, the Defendants were held not liable for the damage occasioned by the pipe bursting.

(1) 25 L. J. (Ex.) 212.

"And in *Withers* v. *North Kent Railway Company* (1), where a portion of the line of railway was injured by an extraordinary flood, the state of the road being secure against ordinary flood, the company was held not liable for injury to a passenger by displacement of the rails.

"These cases appear to me to be very similar to the present case, here the means of escapement allowed in the tanks were sufficient for all ordinary floods; they were such as are universally employed throughout the country, but they broke down under the pressure occasioned by the extraordinary floods induced by an extraordinarily heavy fall of rain.

"I find, then, that the Defendant was bound only to use all reasonable care and precaution to prevent the occurrence of ordinary accidents arising from the bursting of the tanks.

"That he did use such reasonable care and precaution with respect to the tanks referred to in the plaint; that the bursting of the tanks in December, 1865, was an extraordinary accident against which Defendant was not bound to provide; and that he is not liable to Plaintiffs for the damage sustained by them in consequence of the bursting of the said tanks."

On appeal, the High Court of *Madras* upheld the judgment of the Court below in favour of the Respondent. In his judgment the Hon. *William Holloway*, acting Chief Justice, said:—

"It was not attempted to impeach the conclusions of the Civil Judge upon the evidence, and the question of negligence of construction does not really arise. These conclusions are:—1. That the tanks were existent beyond living memory. 2. That they were breached by an extraordinary flood. 3. That they were tanks constructed in the ordinary manner, with escapements sufficient for all ordinary floods, and are such as are universally employed. 4. That these tanks are absolutely necessary to human existence as far as it depends upon agriculture. 5. And, if there is anything in the point, that the railway was constructed with a full knowledge of their existence. If it had been a case of nuisance there would have been a coming to the nuisance. If the Court on the first hearing of the case had intended to apply the doctrine of

(1) 27 L. J. (Ex.) 417.

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Fletcher v. *Rylands* (1) nothing would have remained but to assess the damages, and this was manifestly not the intention. Coming to the case, therefore, for the first time, I feel at full liberty to consider and decide upon the whole matter involved.

"A rule of English law is not a rule for us unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here. It is impossible not to agree with Baron *Bramwell* that it is important to ascertain the principle on which a case should be decided, and in every case in which it is a question of a right, the nature of that right and its grounds of origin demand careful scrutiny. When a law, made up by cases, determines that there is in a particular case a liability, it in fact decides that there has been an infraction of right. When the House of Lords and the Exchequer Chamber in that case decided that there was a liability to compensate, they, in fact, decided that a man has a right to store water only when he has taken complete precautions against its escape, that the escape is irrebuttable evidence of the culpable hurting of the right of another, of the commission of an injury, and that he is bound to compensate for the damage caused. The rights of demand which we are here discussing are in English Law called torts, and by modern writers on Roman Law they are commonly termed obligations arising from unpermitted acts. It has been objected to this classification that all independent rights of demand are to be included in this group which have for their object the preserving unimpaired the jural condition of a person, and restoring it where it has been injured without legal ground, and indifferently, in the first place, whether the hurtful act was an unpermitted one or not (*Förster, Preuss. Priv. R.* 523). The point to which the attention of this eminent practical lawyer is here directed, is the fact that an act, apparently innocent and not therefore unpermitted, becomes the basis of the claim when damage actually results. The English case is an example of this. The truth, however, is that the act is decided to be an unpermitted one when it creates the damage, and this, not because damage without injury is or can be a cause of action, but because the right of the neighbour is not a right to prevent the building of a reservoir, but a right to prevent his

(1) Law Rep. 3 H. L. 330.

mine from being invaded by water artificially collected. The right is not one to collect any water at his pleasure, but only such as he can restrain within his own bounds. When he fails to restrain it (this being the compass of his right) he exceeds that right, infringes the right of his neighbour, and commits an injury. In that case of *Fletcher* v. *Rylands* the Lord Chancellor says (1):

"'My Lords, the principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the Defendants, in order to have prevented that operation of the laws of nature.'

"The test here proposed is whether the accumulation took place in the course of the natural user of the close. Now it is very obvious that the most natural user of land is for the purposes of agriculture, and that in *England*, until the summer of 1868, it never entered into the head of any Englishmen that the storing up of large quantities of water could be essential to agriculture. How does the case stand here? Such storing is absolutely essential to the simple agriculture of the people. This cannot be put more forcibly or more truly than it has been put by the Civil Judge. Laws older than the Mahomedan domination, as old as authentic history, have recognised the primary necessity of such tanks, and declared the destruction of them the greatest of crimes; and for the obvious reason that they are the well spring of a people's life—surely the storing up of water is no mere artificial user of Indian land but the only possible mode of natural user.

(1) Law Rep. 3 H. L. 338.

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Looking therefore at the principle of this case, and not merely at its form, I am clearly of opinion that there is no right to compensation simply because of damage from an escape. The rule upon which the relative rights of men are to be determined is no mere unbending formula. The existence of men in society requires that each should sacrifice a portion of his abstract rights to permit of the co-existence of others. This has of course been constantly recognised. In this as in so many other cases the formal rule of law is to be drawn from the matter of which it is the regulating principle. In *Tipping* v. *St. Helen's Smelting Company* (1) the necessities of commerce are admitted as a ground for compelling persons in a populous town to put up with poisonous vapours, although the superior sanctity of property, always in *England* better considered than life or limb, is duly asserted at page 651. In *Cavey* v. *Ledbitter* (2) the Chief Justice points out the influence of time, place and circumstance upon the question of nuisance. In *Bamford* v. *Turnley* (3) all the Judges recognise the doctrine. At the close of the judgment in the Exchequer Chamber in *Fletcher* v. *Rylands* (4) the necessities of traffic upon the highway and of trade and commerce are recognised as grounds for the more limited duty imposed upon carriers and people throwing down packages from wharves.

"Whether *volenti non fit injuria* can be regarded as an explanation of the diversity where people are not fed by ravens, and where it is scarcely a matter of choice with a *London* clerk or labourer whether he will go into the *St. Katharine's Docks* or not, is another question. The true reason of the rule is that although not an immediate national economy, wealth and prosperity, with all other objects of man's ethical interest, are mediate sources of law. This has had, always will have, and always ought to have, an important influence upon the construction of legal propositions. In the present case, I say agriculture is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property. This art in the country from

(1) Law Rep 1 Ch. 66; 11 H. L. C. 642.
(2) 13 C. B. (N.S.) 476.
(3) 3 B. & S. 66.
(4) Law Rep. 1 Ex. 265.

which this case comes is impossible without tanks by which water is to be stored to meet the terrible drought, which in their absence would wither every blade of grass, destroy the cattle, and render future culture impossible. This paramount human interest requires that a certain amount of risk should be incurred by those who, for the purposes of gain or otherwise, resort to a country of which this is the normal condition. They must put up with the inconveniences. They have a perfect right to require that they shall not be injured by the negligence of other people, but they have no right to be secured at all events against consequences resulting from the natural user of the land and the changeable character of the climate. To impose such a duty upon a landlord here, because it has been imposed elsewhere upon men who store up matter which may be dangerous and is not necessary, is to disregard the very principle upon which that duty was imposed. These observations are sufficient for the disposal of the only question put in issue against the Appellants, and I only remark upon the question of negligence because the Civil Judge has done so. My remarks shall be very few.

"As to the sufficiency of the precautions to be used he will not find the English cases so clear as he seems to have imagined. In *Withers* v. *North Kent Railway Company* (1) there was a decision to the effect stated. The regular reporter, however, has judiciously omitted it, and because he, as well as the Privy Council (2), was unable to reconcile it with one which was decided within three weeks (*Ruck* v. *Williams* (3)). The doctrine of normal and abnormal is pushed to an extraordinary length in that case, and the only inference which it seems possible to draw is, that Commissioners of Sewers are bound to greater foresight than railway companies. The doctrine of the Privy Council case again, not by any means going to the length of the case in the Exchequer, was disapproved of in *Czech* v. *General Steam Navigation Company* (4), where *Willes*, J. declares that the throwing the burden of proof on the railway company simply on account of the accident was wrong in the opinion of *Erle*, C.J. It cannot be said, therefore, that the English doctrine is in a very settled state. It cer-

(1) 27 L. J. (Ex.) 417.
(2) 1 Moore, P. C. (N.S.) 101.
(3) 3 H. & N. 308.
(4) Law Rep. 3 C. P. 14–16.

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tainly seems that if a passenger injured by a railway company is required to prove that there was negligence, that company being carriers for hire, the rule cannot reasonably be otherwise where, without any contractual relation, a man is to be made liable for *culpa* in the non-performance of the duty 'of exercising in his habitual conduct a certain foresight and circumspection of especially abstaining from operating hurtfully upon the property of others. He who acts in contrariety to this civic duty without any definite design whatever is found *in culpa*.' *Holtzendorff, Encyclopädie* ii., p. 242. If therefore the question of negligence had been an issue, I should consider it not proved. The finding of the Civil Judge on this point was not contested at the bar. For the same reason I do not think it necessary to consider what construction ought to be put upon the passage at the close of the Lord Chancellor's judgment in *Tipping* v. *St. Helen's Smelting Company* (1) with respect to prescription, or to consider what influence the antiquity of the tanks ought to have upon this question.

"My conclusions are, that on the true understanding of the case of *Fletcher* v. *Rylands* (2), the Civil Judge's decree is right; that if otherwise the imposing of such a duty upon a landowner is forbidden by precisely the same principles as have forbidden the imposition upon wharfingers, railway companies, and shipowners. That this attempt would never have been made if the final decision had rested with Judges conversant with the necessities of the country, and that it has only been made in the hope that such a rule may be imposed elsewhere by Judges not so conversant. It is my hope and belief that that attempt will not be successful; if it is I can imagine nothing more calamitous to the Hindu than what is called opening up the resources of the country. Either he must throw his land out of cultivation, or, without proof of any negligence on his side, be compelled to compensate for damages resulting from natural cultivation, to works centuries in advance of his immediate social necessities, and expensive beyond any which these actual necessities would have generated.

"I entertain neither doubt nor hesitation in dismissing this appeal with costs."

And Mr. Justice *Innes* said: "If a man causes injury to another,

(1) 11 H. L. C. 642. (2) Law Rep. 3 H. L. 330.

and damage follows, he is answerable for the act from which the injury has arisen if he could have avoided it. About the damage in this case there is no question; then was there injury? Was there, by any avoidable act or omission of Defendant, a breach of an obligation due to Plaintiff. What is the obligation of Defendant as to keeping these tanks from bursting and causing mischief? The tanks are ancient. They are maintained as they have been immemorially used for the purposes of irrigation, according to a system in use throughout this part of *India*. The State is the general landlord, but in some parts of the country it has made over certain of its rights as landlord to zemindars like the Defendant, who thus become vested with the duties of management which previously appertained to the State. One of the duties which the State has always recognised as appertaining to itself is the maintenance of old and the extension, wherever practicable, of new works of irrigation. The reason is obvious. Where works of irrigation are in existence, a population gradually gathers in the neighbourhood, and land is taken up and brought under cultivation on the faith of the works being maintained. Water brings with it abundance in good seasons, and enables provision to be made against seasons of scarcity. If the maintenance of these works is abandoned, the population dwindles with the diminution of the means of subsistence, becomes impoverished, and finally disappears. The State also suffers in the loss of revenue which follows the diminution of abundance. When, therefore, irrigation works have been constituted and maintained, and proved conducive to the increase of population and wealth, it seems obvious that their maintenance ought to be continued, and that the State, in recognising its duty to maintain them, has acted upon the view that their maintenance is necessary to the prosperity and advancement of the country. The tanks of this Defendant are in the same position in this respect as the other works under the direct management of the State. Now, it appears to me that in this country, that which the State has, in the interests of the community, taken upon it to maintain, it has impressed with the character of lawfulness, and although the maintenance of it may be, in some particular circumstances, dangerous to the interests of private persons, it is by the character which the State, acting for the community, has impressed upon it,

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removed from the class of dangerous and noxious things which a man brings and keeps at his peril, 'whether' (as expressed by *Blackburn*, J., in *Fletcher* v. *Rylands* (1)) 'the things so brought be beasts or water, or filth or stenches,' and is properly placed on a footing with the class of dangerous trades and occupations in *England*, for which there is legislative sanction. In such cases, what is authorized to be done must be done in a careful manner. This is the whole obligation; in other words, negligence causing damage gives a cause of action; but unless there be negligence there is no action for damage caused by acts within the scope of the express or necessarily implied authority conferred by the law. (See *Jones* v. *Festiniog Railway* (2), in which *Vaughan* v. *Taff Vale Railway Company* (3) is quoted, and the recent case of *Smith* v. *London and South-Western Railway* (4) (decided in the Exchequer Chamber).

"Now, it is conceded that in this case the Defendant had so maintained the tanks up to the date of the damage occurring that for twenty years they had not burst; and the evidence shews that but for the extraordinary rainfall there was no reason for apprehension. They were of the ordinary construction of most of the Government tanks; but it is conceded that some tanks have stone weirs, which offer greater security for the gradual escape of an unusual influx of water than those of these tanks. But I agree with the Judge that Defendant was not bound to avail himself of the last results of science, and that there was no want on his part of proper care and precaution.

"For the reasons just given I think that the nature of these tanks, as shewn in the defence, is such as to exempt Defendant from responsibility for damage caused in the maintenance of them, unless there has been negligence on his part giving occasion to the damage. There has clearly been no negligence, and I agree in dismissing this appeal with costs."

Sir *John Karslake*, Q.C., Mr. *Watkin Williams*, Q.C., and Mr. *Mansel Jones*, for the Appellants:—

The principle applicable to cases like this is accurately laid

(1) Law Rep. 1 Ex. 280.
(2) 37 L. J. (Q.B.) 214.
(3) 29 L. J. (Ex.) 247; 5 H. & N. 679.
(4) 40 L. J. (C.P.) 21.

down in *Fletcher* v. *Rylands* (1). Lord *Cranworth* there said: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

So also Lord *Cairns* said (2): "If the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose, which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing, they were doing at their own peril."

See also *Filliter* v. *Phippard* (3); *Tubervil* v. *Stamp* (4); *Jones* v. *Festiniog Railway Company* (5); *Vaughan* v. *Taff Vale Railway Company* (6); *Ruck* v. *Williams* (7). Here the use of the land was not a natural use. It cannot be said to be a natural use to store up water in quantities so large that it may escape and damage your neighbours. When you are building a water-tank, it is not sufficient to make it large enough to contain the amount of water that falls ordinarily. It is proper to expect extraordinary falls of rain and to make provision therefor. There is ordinary "extraordinary" weather against which to provide. If a man keeps a lion in a cage, and the cage is struck by lightning, and the lion let loose, is he to say it was the act of God? The damage is done because he keeps a dangerous thing which is liable to be let loose. If a man has a fire in his house, and the fire extends to his neighbour's house, he will be liable, even though there were no negligence on his part. It cannot make any difference as to the damage here, that the tanks are of great use to the landowner and his

(1) Law Rep. 3 H. L. 340.
(2) Ibid. 339.
(3) 11 Q. B. 347.
(4) 1 Salk. 13.
(5) Law Rep. 3 Q. B. 733.
(6) 29 L. J. (Ex.) 247; 5 H. & N. 679.
(7) 27 L. J. (Ex.) 357; 3 H. & N. 308.

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tenants. With regard to the argument of coming to a nuisance, it is not a question of nuisance at all. We could not restrain them by injunction; all we could say would be, if you place or keep this artificial structure on the land, so as to be dangerous to your neighbours, then you must be responsible for damages: *Tipping* v. *St Helen's Smelting Company* (1). If the reservoir exists for any number of years, the zemindar does not acquire a prescriptive right to allow water to escape. With regard to negligence, the Courts below have wholly misinterpreted the law as to it.

Mr. *Leith*, Q.C., and Mr. *S. G. Grady*, for the Respondent:—

Our arguments are: First, the general law of *England* is not applicable here. Secondly, if it were, the case of *Fletcher* v. *Rylands* (2) is not applicable. And, thirdly, if it were, then this case comes within the exceptions that are alluded to in *Fletcher* v. *Rylands* (2). The facts in *Fletcher* v. *Rylands* are wholly different from the facts here; for there a man had brought on the land something for his own purposes. He was under no obligation to maintain it there; he could have removed it whenever he liked. Here the reservoir was an integral portion of the land as the Respondent received it. There was no voluntary act on his part in placing it there. It would have been a crime on his part to remove it. He took all reasonable and proper precautions to prevent the tanks from bursting. But the escape of the water was the result of unavoidable circumstances, over which he had no control. The Appellants in their plaint did not charge the Respondent with negligence.

[They referred also to *Mayor of Lyons* v. *East India Company* (3).]

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Their Lordships having reserved their judgment, it was now delivered by the

THE RIGHT HON. SIR ROBERT P. COLLIER:—

The *Madras Railway Company* claimed in this suit damages against the Defendant, the Zemindar of *Carvatenagarum*, for

(1) Law Rep. 1 Ch. 66; 11 H. L. C. 642. (2) Law Rep. 3 H. L. 330.
(3) 1 Moore, P. C. 175.

injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The Defendant denied that the injuries complained of resulted from the bursting of the tanks; he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by *vis major*, or the act of God. He further pleaded in these terms:—

"The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in *India*, and particularly in this district and in the Zemindary of *Carvatenagaram* and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"The Defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to Government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of the Appellants in the construction of their works, but this contention was abandoned. It was found by both Courts, and it is not now disputed, that the works of the Plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were:—

1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the Defendant's control.

2. Whether Defendant is liable for any, and if so what, damages sustained by the Plaintiffs.

The evidence given in the cause may be summarized as fol-

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lows:—It was shewn that the tanks of the Defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner, that the banks were properly attended to and kept in repair, that sluices and outlets for the water were provided of the kind usually employed both in private and Government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years; but that an improved description of sluice, of recent introduction, would be still more efficacious. That at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the deputy-inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the Defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighbouring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed, and finally carried away.

Upon these facts the Acting Civil Judge of the Civil Court of *Chittoor* found for the Defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent. This judgment was affirmed by the High Court on appeal.

The Appellant now contends that the judgment of the High Court should be reversed on two grounds:—

1st. That the Defendant, by storing up water on his land, rendered himself liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2nd. That both the Indian Courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is *Fletcher* v. *Rylands* (1), which it becomes necessary to examine. In that case the Plaintiffs, the owners of a mine, sued for damages the Defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works

(1) Law Rep. 3 H. L. 330.

into the Plaintiff's mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the Plaintiffs were entitled to damages against the Defendants. The grounds of this judgment are stated very clearly and shortly by the then Lord Chancellor (Lord *Cairns*), and Lord *Cranworth*. The Lord Chancellor says :—

"The principles on which this case must be determined appear to me to be extremely simple. The Defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground; and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the Plaintiff, the Plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving [illegible] interposing some barrier between his close and the close of the Defendants, in order to have prevented that operation of the laws of nature. . . . On the other hand, if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities, and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing, they were doing at their own peril; and if, in the course of their doing it, the evil arose . . . . of the escape of the water and its passing away to the close of the Plaintiff, and injuring the Plaintiff, then, for the consequence of that, in my opinion, the Defendants would be liable."

Lord *Cranworth* thus states the principle of the decision: —

"If a person brings and accumulates on his land anything

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which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non lædat alienum.*"

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in *Vaughan* v. *Taff Vale Railway Company* (1), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by statute. Chief Justice *Cockburn* observes, "where the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it is authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the Legislature may be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity: *Blyth* v. *Birmingham Waterworks Company* (2).

On the other hand, in *Jones* v. *Festiniog Railway Company* (3), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done

(1) 5 H. & N. 679. (2) 25 L. J. (Ex.) 212.
(3) Law Rep. 3 Q. B. 733.

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ALIENATION OF LANDS. See Polliem. 2.

APPEAL, LEAVE TO. A party who in observance of the rule of valuation prescribed by the stamp law of the country in which he sues, has paid stamp duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can shew that the value of the property in dispute does reach the appealable amount. *Baboo Lekraj Roy* v. *Kanhya Singh* 317

BOND. See Champerty.

BREACH OF CONTRACT. See Contract. Compromise.

CANCELLATION OF DEED. See Purdah Lady, Deed by.

CHAMPERTY. The Mofussil Courts of *India*, administering justice according to the broad principles of equity and good conscience, will not apply the English law of champerty and maintenance according to the practice of the English Courts, but they will consider whether a transaction impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation; and they will not allow a stranger to interfere in family affairs by an agreement between him and the real heirs that he should be entitled to a share of the estate.

Case of *Fischer* v. *Kamala Naicker* (8 Moore's Ind. Ap. Ca. 170) distinguished.

A., a stranger, advanced money to enable *B.*, *C.*, and *D.*, childless Hindu widows, upon a false claim of inheritance, to take the estate of the family from *E.*, the rightful heir; *A.* got the entire control of the suit and of the affairs of *B.*, *C.*, and *D.*; and *B.*, *C.*, and *D.* executed an instrument purporting to secure to *A.* a large sum of money upon their obtaining the property, and also gave him their bond for a sum alleged to have been advanced by him.

B., *C.*, and *D.* having agreed with *E.* to withdraw the suit upon terms of compromise, *E.* was induced to enter into a bond to *A.*, by which *E.* in effect engaged to pay to *A.*, in discharge of his claim upon *B.*, *C.*, and *D.*, a fixed sum, which was claimed by *A.* as the amount due to him; and *A.* agreed to abandon his claim upon them on such

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payment, retaining the securities he held from them until *E.*'s bond was satisfied.

At the time of entering into this bond, *E.* had only just attained his majority, was without proper counsel or assistance, and was threatened by *A.* with the consequences of not immediately acquiescing in his demand, the threats not being of bodily violence; but of carrying on the suit to his ruin; and such threats overcame his free will, and induced him, contrary to his own judgment and sense of right, and without any evidence that the sum claimed was due, to execute the bond.

On a suit by *A.* to enforce the bond :—

Held, that the taking of the bond from *E.* did not amount to novation; that the bond was wholly invalid as against *E.*, and could not even be made to stand as a security for what might really have been advanced by *A.* to *B.*, *C.*, and *D.*, as nothing was ever due from *E.* to *A.*, and there existed no privity of contract between them. *Chedambara Chetty* v. *Renga Krishna Muthu Vira Puchaiya Naickar* .. 241

COLLECTORS, REPORTS OF. Reports made by collectors, acting under Reg. VII. of 1817, of the *Madras Presidency*, are not to be regarded as having judicial authority where they express opinions on the private rights of parties; but being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded on them. *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* 209

COMPROMISE. Immoveable property partly situated in *Rohilcund* and partly in *Oudh*, which had formerly belonged to the common ancestor of the Appellant and the Respondent, was claimed by each on the ground of heirship. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in *Rohilcund* but not in *Oudh*, where the Respondent was, and continued, in possession. At the end of nine years from the date of the deed of compromise the Appellant sued for possession of her share of the property in *Oudh*.

The Judicial Commissioner of *Oudh* having decided that the suit was founded on the contract contained in the deed of compromise or for a breach of it, and, therefore, barred by the *Indian Limitation Act*, XIV. of 1859, s. 1, clause 10. It was

Held (reversing this decision), that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the Appellant to prove her case, and not all her case; and that, consequently, the suit was not founded on contract or for a breach of it, but was a suit for the recovery of immoveable property "to which no other provision of the Act applies," and, therefore, subject only to the limitation of twelve years prescribed by s. 1, clause 12. *Rani Mewar Kuwar* v. *Rani Hulas Kuwar* 157

CONCEALMENT OF PRIOR CHARGE. A person who has represented to an intending purchaser of land that he has not a security over that land, and induced him, under that belief, to buy, cannot as against that purchaser subsequently put his security in force. *Munnoo Lall* v. *Lalla Choonee Lall and Others* 144

CONFISCATION. See Limitation.

CONSTRUCTION OF MADRAS REGULATION XXV. OF 1802. See *Collector of Trichinopoly* v. *Lekkamani and Others* 282

CONTRACT. *A.* held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*; the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A.*'s proposal, and at the same time informed *A.* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.

A. afterwards sued *B.* for interest on the debentures :—

Held, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immoveable property :—

Held, that such correspondence did not require registration under the *Indian Registration Act*, 1866. *Port Canning Land Investment Reclamation and Dock Company* v. *Smith* 124

CONTRACT, INTRODUCTION OF NEW TERM INTO. See *Port Canning Co.* v. *Smith* 124

CORRESPONDENCE, CONTRACT CONSTITUTED BY. See Contract.

DEBENTURES. See Contract.

DECLARATORY DECREE. See Practice. 2.

DECREE. See Practice. 2.

DEED, CANCELLATION OF. See Purdah Lady, Deed by.

DEED OF COMPROMISE. See Compromise.

DURPUTNEE TALOOK. See Putnee Talook.

ESTATE OF INHERITANCE. See Polliem. 1.

FACT, QUESTION OF. See Practice. 1, 3.

HEIRSHIP. See Compromise.

In a suit for setting aside deeds some evidence ought to be given by the Plaintiff in order to impeach such deeds; and he is not entitled, merely on proof of heirship, to throw on the Defendant the burden of shewing a better title. *Tucoordeen Tewarry* v. *Nawab Syed Ali Khan* 192

HEREDITARY RIGHT. See Polliem. 2.

HINDU, LEGITIMACY OF. See Legitimacy.

IMMOVEABLE PROPERTY. See Compromise; Contract.

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INDIAN LIMITATION ACT, XIV. 1859. See Compromise ; Limitation.

INDIAN REGISTRATION ACT, 1866. See Contract.

INHERITANCE, ESTATE OF. See Polliem. 1.

INTEREST. See Contract.

LEGITIMACY OF HINDU. A child, born in wedlock, of a Hindu husband and wife, is not rendered illegitimate by the circumstance that he was begotten before their marriage. *Collector of Trichinopoly* v. *Lekkamani and Others* 282

LIMITATION. *A.* died the ostensible owner of certain lands, leaving two sons under age. Upon *A.'s* death, *B.*, alleging that he was himself the real owner of the lands, caused himself to be recorded as owner in the collector's books, and took possession. Some years later, *B.* was convicted and executed as a rebel, and all the property in his possession confiscated, including the land so taken by him.

The sons of *A.* sued for the recovery of the lands of which they had been dispossessed by *B.*

The suit was brought more than a year after the younger Plaintiff came of age, and more than a year after the passing of Act IX. of 1859, which allows (s. 20) only one year to sue, and does not save the rights of persons under disability :—

Held, that the claim was barred by limitation. *Mohummud Buhadoor Khan* v. *Collector of Bareilly and Others* 167

MADRAS REGULATION XXV. OF 1802, CONSTRUCTION OF. See *Collector of Trichinopoly v. Lekkamani and Others* 282

MOFUSSIL COURTS. See Champerty.

MOHUNT. The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation, and to be guided by them. The custom and practice in such matters is to be proved by testimony.

A zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom.

An acknowledgment, taken in troubled times from the guardian of an infant mohunt, of a zemindar's customary right to control and remove the mohunt, is entitled to little, if any, weight as evidence of the custom.

The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government ; and Reg. VII. of 1817, of the *Madras Presidency*, merely defined the manner in which that power was thenceforth to be exercised. *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* 209

NOMINATION BY GOVERNMENT. See Polliem. 2.

NOVATION. See Champerty.

OWNER. See Limitation.

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1. POLLIEM. An unsettled polliem in the *Madras* Presidency may be hereditary; whether it is so, must be ascertained by evidence in each case. Proof of possession, or receipt of rent by a person who pays the land revenue direct to Government, is *primâ facie* evidence of an estate of inheritance.

Where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main question of fact necessary to be decided, and a party may have been prevented from adducing evidence, a fresh issue may be directed to try the principal question of fact.

The first issue raised in the lower Court was, whether a zemindary or the income thereof was answerable for the debt of the late zemindar.

Their Lordships granted an issue to try whether the late zemindar had an estate of inheritance in the zemindary which descended to his minor son as his heir.

Terms on which such issue will be granted. *Oolagappa Chetty* v. *Arbuthnot* 268

2. ———— The affirmative words of the 2nd section of *Madras* Reg. XXV. of 1802 did not either give new rights to the owners of lands not permanently assessed, or take away from them any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of land," as used both in the *Bengal Code* of 1793 and in the *Madras Code* of 1802, refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of *Madras* Reg. XXV. of 1802, must also be read in a similar sense as meaning the possession and rights of a "proprietor" in the technical sense in which that word is used, viz., the person who pays the revenue immediately to Government.

The preamble of *Madras* Reg. XXV. of 1802 recognises the right of private property, and does not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The object of the *Madras* Reg. XXXI. of 1802 was only the protection of the revenue from invalid lakirij grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of land" refer not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue.

A polliem may be hereditary though not permanently settled under Reg. XXV. of 1802; and the existence of a proprietary estate in polliems or other lands not permanently assessed, and the tenure by which it has been held, are judicially determinable on legal evidence.

The polliem of *Marungapuri* is an ancestral hereditary polliem, and not subject to the appointment of Government.

In *India*, the proof of possession or of receipt of rent by a person

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who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindary. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir. There is no difference in this respect between a polliem and an ordinary zemindary. The only difference between a polliem or zemindary which is permanently settled and one that is not is that, in the former the Government is precluded for ever from raising the revenue; and in the latter, the Government may or may not have that power. *Collector of Trichinopoly* v. *Lekkamani and Others* 282

1. PRACTICE. See also Appeal.
The Judicial Committee will not disturb the concurrent finding of two Lower Courts on a question of fact. *Munnoo Lall* v. *Lalla Choonee Lall and Others* 144

2. ——— Where a suit is brought for confirmation of possession and the setting aside of deeds by a person alleging himself to be in possession and to be heir, and he proves his heirship and that the deeds ought to be set aside, but fails to prove possession, the decree cannot be for confirmation of possession, but it should direct the deeds to be set aside, and should not be limited to a declaration of the Plaintiff's title as heir. *Tacoordeen Tewarry* v. *Nawab Syed Ali Khan* .. 192

3. ——— Terms on which a fresh issue to try principal question of fact will be granted. *Oolagappa Chetty* v. *Arbuthnot and Others* 268

PURDAH LADY, DEED BY. Where a purdanusheen lady, living apart from her relations and natural advisers, makes a deed in favour of a person who has on some occasions acted as her man of business, the strongest proof ought to be given by him that the transaction was a real and *bonâ fide* one, and was fully understood by the lady whose property is dealt with. *Tacoordeen Tewarry* v. *Nawab Syed Ali Khan* 192

PUTNEE TALOOK. Under the description "putnee talook" and "durputnee talook," it must be *primâ facie* intended that the tenure called a putnee tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale free from incumbrances. According to the effect of Act X. of 1859, s. 105, Reg. VIII. of 1819, ss. 8 and 11, and probably also of Reg. I. of 1820, the effect of the sale of such a talook for arrears of rent is to destroy all incumbrances which have been created by the putneedar, *e.g.* a durpetnee tenure. *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder Dey Chowdhry* 178

QUESTION OF FACT. See Practice. 1.

REGISTRATION. See Contract.

RELIGIOUS ENDOWMENT. See Mohunt.

REPORTS OF COLLECTORS. See Collector.

SALE FOR ARREARS OF RENT. See Putnee Talook.

STAMP DUTY ON APPEAL. See Appeal.

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TALOOK. See Putnee Talook.

TENURE. See Putnee Talook.

UNDUE PRESSURE. See Champerty.

VALUATION. See APPEAL.

ZEMINDAR, CONFIRMATION BY. See Mohunt.

————, DEBTS OF, WHETHER CHARGEABLE ON ZEMINDARY. See Polliem. 1.

INDIAN APPEALS—PART I.

ERRATUM.

Page 114, line 13 from bottom, *for* "The Right Hon. Sir Robert P. Collier," *read* "The Right Hon. Sir Montague E. Smith."

the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And it was further argued that, if the contention of the Appellant concerning a partition by butwara were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be effected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee.

Upon this it is to be observed that fraud would be a substantive ground for relief, and that, if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court.

In the more improbable case of such a fraud being effected by means of butwara proceedings, his remedy might be more difficult by reason of the finality of the partition, and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly arise on this appeal, their Lordships deem it sufficient to observe that the finality of such a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and that even in this latter case Courts of Justice have found the means of relieving the person injuriously affected by fraud. (See the case of *Nawab Sidhee Nuzur Ali Khan* and *Rajah Ojoodyaram Khan* (1)). In such cases, however, the alleged fraud is the foundation of the suit, and it is difficult to see upon what principle, in the absence of that or some equivalent cause of action, the mortgagee, who could not have sued the co-sharers for a partition, could have any remedy against them or their separated shares, which, under the butwara, had become distinct estates. And if he does not claim to have such a remedy, but is content to claim, as the subject of his security, that which his mortgagor has received in substitution of the original pledge, it is still more difficult to see what right the mortgagor can have to resist such a claim, or to say,

(1) 10 Moore's Ind. App. Ca. 540.

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BYJNATH LALL v. RAMOODEEN CHOWDRY.

I, being in possession of the new estate, insist on your being limited to the old.

In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made.

A distinction has, however, been taken between the parcels in the possession of the Respondents, *Ramoodeen Chowdry* and *Ramanoograh Sahoy*, and those in the possession of the Mohunt and of the Respondents *Mahomed Ahseen* and *Kashi Pershad Singh*, on the ground that the latter are portions of the mouzah *Tajpore Ruttunpore*, which was expressly excluded from the security. It is certainly possible to conceive cases in which, the security not covering the undivided share in the whole estate, it might be difficult to determine which of the lands allotted in substitution of that share represented the mortgage premises. No such difficulty, however, exists in the present case, inasmuch as the whole of *Tajpore Ruttunpore* was allotted to *Gopal Narain Singh* on the partition. He was already entitled to an 8-annas undivided share in this mouzah, which, being excluded from the mortgage, is not claimed by the Appellant. But it follows from this that whatever portion of this mouzah was allotted to him in excess of those 8 annas must have been so allotted in substitution of his interest in the mouzahs *Gunniporebeja* and *Pemburinda*, and, therefore, became subject to the mortgage. Their Lordships, therefore, are of opinion that, if all the parcels in dispute were still in the possession of *Gopal Narain Singh*, he would have no defence to the Appellant's claim in respect of any of them.

The only remaining question is, whether the Respondents other than the representatives of the mortgagor are in a better position

than he would have been. They were all mere purchasers at execution sales of his right, title, and interest (the Mohunt purchasing at a date subsequent to the final foreclosure), and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the Appellant's title is not very material; but if it were, there is no doubt that they were made with such notice. Not only was the mortgage deed registered, but all the Respondents, except the Mohunt, whose title had not then accrued, seem to have been served with notice of the foreclosure proceedings, and might have claimed the right to redeem. They had, also, notice of the partition. To say that they were deceived by the description of the mortgaged premises is to affirm, not that they had no notice of the Appellant's superior title, but that they mistook its legal effect.

Their Lordships are therefore of opinion that the decree of the Principal Sudder Ameen was right as against all the Respondents; and they will humbly advise Her Majesty to reverse all the four decrees under appeal; and, in lieu thereof, to made a decree dismissing all the four appeals, and affirming the decree of the Principal Sudder Ameen with the costs of the proceedings in the High Court. The Appellant must also have the costs of these appeals.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for Respondents: *Watkins & Lattey.*

J. C.* 1874 Feb. 5.

THE PORT CANNING LAND, INVESTMENT, RECLAMATION, AND DOCK COMPANY, LIMITED, A COMPANY REGISTERED UNDER ACT XIX. OF 1857 (PLAINTIFFS) . . . . } APPELLANTS;

AND

A. SMITH, ESQUIRE, CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE TOWN OF CANNING (DEFENDANT) . . . . . } RESPONDENT.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

A. held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*; the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A.*'s proposal, and at the same time informed *A.* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.

A. afterwards sued *B.* for interest on the debentures :—

Held, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.

A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immoveable property :—

Held, that such correspondence did not require registration under the *Indian Registration Act*, 1866.

IN this case the plaint sought to recover from the Respondent, as Chairman of the Municipal Commissioners of the Town of *Canning*, the interest alleged to be due upon a number of municipal debentures issued by the said commissioners, and held by the Appellant company.

The main defence was, that under arrangements between the company and the municipal commissioners the debentures were

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

to be commuted for land, the company agreeing to pay the commissioners a quit-rent equivalent to the amount of interest on the debentures; that the debentures were issued on certain terms of which the company had elected to avail themselves, and that they could not now claim the interest.

There was also a technical defence on the ground that no notice of action had been given to the Defendant as required by the Act, No. III. of 1864, s. 87, of the *Bengal Council.*

Mr. Justice *Phear*, Judge of the High Court at *Calcutta*, in its ordinary civil jurisdiction, decreed in favour of the Plaintiffs, assessing the damages at Rs.27,522.

On appeal, a Division Bench of the High Court, on the 20th of September, 1869, reversed that decree and dismissed the suit with costs. From that decree the present appeal was brought.

In 1850 the Government of *India* passed an Act to enable improvements to be made in towns, whereby commissioners could be appointed to manage the affairs of any town, with full power to make all necessary contracts, levy taxes, &c., for the purpose of carrying out the Act.

Such persons were known as "Municipal Commissioners," and, in accordance with the Act, certain persons were appointed to act as such commissioners for the town of *Canning*, a new port on the river *Mutlah*, near *Calcutta.*

In 1863 these municipal commissioners, with the sanction of Government, proposed to raise loans on debenture for ten lacs of rupees, and they issued a notice, which contained the following passages:—

"The Municipal Commissioners of *Canning*, with the sanction of Government, are prepared to receive sealed tenders for loans on debenture for ten lacs of rupees for the general improvement of the town and port of *Canning*, and the lands adjoining thereto, on security of the properties of the municipality as described in the annexed schedule, and on the credit of the existing rents of lands, and of the rents, rates, and taxes that may be hereafter imposed and levied on account of the municipal fund under the provisions of Act XXVI. of 1850, or of any other Act that may be passed by the Legislature. The tenders are to be for sums of not less than Rs.600. The debentures will have a currency of five years, and

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PORT CANNING LAND, INVESTMENT, RECLAMATION, AND DOCK CO. v. SMITH.

carry interest at the rate of 5½ per cent. per annum from their respective dates. Interest to be paid half-yearly, on the 30th of June and the 31st of December, at the *Bank of Bengal.*

"Debenture holders are to be entitled to convert their debentures to the extent of one-half of the entire loan raised, into leasehold titles to lands in the town, within a period of two years from the issue of the debentures, at the rate of Rs.600 of loan for one beegah of ground. Such privilege of conversion to be given to debenture holders in order of the dates on which applications for such conversion are received by the commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs.30 per beegah per annum, such leaseholders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs.600 per beegah, provided such privilege be claimed within four years from the 1st of January next, and the privilege of conversion to be retained during the remaining currency of the lease, but at a rate per beegah to be fixed at intervals of four years on a review and estimate of the then value of the leases, such value to be determined by the commissioners. Existing leaseholders who become holders of debentures may, under like conditions, convert such debentures at once into freehold tenure of their present leasehold property at the rate of Rs.600 per beegah.

"Schedule Properties.

"Soonderbun Grant, No. 54.

"1. 678 beegahs of ground already let out for Rs.7800 per annum.

"2. About 4196 beegahs of ground in the town not yet leased out.

"3. 13,121 beegahs of ground outside the present town limits partly let out to ryots and grantees, and yielding an annual rent of Rs.2,716.

"Reserved portion of Grant No. 50.

"1,951 beegahs of land of which about one-half is out on temporary leases.

"By order of the Board.

"*S. H. Robinson,* Honorary Secretary to the Municipal Commissioners."

In March, 1864, an Act was passed by the Council of the

Governor of *Bengal* extending the powers of municipal commissioners, the new powers granted to them being very large, and the 87th section of that Act provided that no action should be brought against the municipal commissioners, or any of their officers, or any person acting under their direction, until one month's notice had been given in writing. The section proceeds "and until such notice be proved, the Court shall find for the Defendant."

In July, 1864, the provisions of that Act were extended to *Canning*.

On the 23rd of January, 1865, a company formed by one Mr. *Schiller* was registered under the name of the *Port Canning Land, Investment, Reclamation, and Dock Company, Limited*, and the prospectus stated that the company was formed with the object of securing land in *Canning*, and improving it by building, letting, or selling.

It also stated that the company would undertake the construction of public works, and that it had obtained from the municipality extensive rights.

It then proceeded thus:—

"In addition to the above concession, the company had subscribed £25,000 to the 5½ per cent. Municipal Debenture Loan at 15 per cent. discount, with option to exchange within two years these debentures for land in the town of *Canning*, at the rate of Rs.1800 per acre in leasehold, and Rs.3600 per acre in freehold, and upon the condition, that for the present the municipal loan be closed."

It appeared that, irrespective of the land to be thus obtained, the company already held certain town lots at *Canning*, registered in the name of the company.

Among the directors of the company were Mr. *Schiller*, Mr. *Kilburn*, Mr. *Whitney*, and *Baboo Ram Gopaul Ghose*, all of whom were Municipal Commissioners for *Canning*.

On the 13th of March, 1865, the new company wrote to the municipal commissioners in the following terms:—

"To the Acting Secretary to the Municipal Commissioners
"for the Town of *Canning*.

"Sir,—We are instructed by the directors of the company to inform you that in lieu of the debentures which are to be given for

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the amount subscribed by them to the loan of the Commissioners of the Town of *Port Canning*, they desire to possess land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations belonging to the commissioners, to such an extent as may be equivalent of said amount of loan.

"The numbers of the lots more especially referred are noted below.

"We further beg to inform you that we are now prepared to pay in the sum of two and a half lacs agreed on 21st March.

"Lots 148 to 153,
162 „ 164,
83 „ 84,
199 „ 233,
169.

"We are, dear Sir
"Yours faithfully,
"*Borradaile, Schiller, & Co.*
"Secretaries and Treasurers."

On the 22nd of March, 1865, the company paid in Rs.250,000, and Rs.200; minus 15 per cent. discount: and subsequently received from the municipal commissioners 123 debenture bonds, representing Rs.250,200.

The following is a copy of one of the debentures, all being in a similar form:

"The Municipal Commissioners of the Town of *Canning*.

"No. 268.

"The 22nd day of March, 1865.

"By virtue of the Act No. III. of 1864 of the Council of the Lieutenant-Governor of *Bengal*, for making laws and regulations (the *District Municipal Improvement Act*), we, the Commissioners of the Town of *Canning*, in consideration of the sum of six thousand rupees, paid to us by the *Port Canning Land Investment, Reclamation, and Dock Company, Limited*, of *Calcutta*, promise to pay to the said *Port Canning Land, Investment, Reclamation, and Dock Company, Limited*, or order, the said sum of six thousand rupees, five years after the date hereof, together with interest thereon at the rate of 5½ per cent. per annum, payable half-yearly on the 30th day of June and the 31st day of December in each year.

"*A. Bainbridge*, Chairman.
(Seal of the Municipal Commissioners.) "*Alexr. Pendleton*, Commissioner."

In January, 1866, Mr. *Kilburn*, who held other municipal debentures, being desirous of exchanging them for land lots, the municipal commissioners wrote to the company requesting to know whether the directors wished to select for the company any of the lots named by Mr. *Kilburn*; but no reply having been received, the Commissioners on the 18th of September, 1866, wrote the following letter to the company:—

"*J. R. Thomson*, Secretary and Commissioner, to the Secretaries
"and Treasurers *P.C.C.B.*

"18/9/66.

"Gentlemen,—I am directed by the chairman to request that you will give your immediate attention to the following:—

"On the 13th March, 1865, the *P. C. Company*, through you, applied distinctly to have lots assigned to them in 'lieu of the debentures which are to be given for the amount subscribed by them to the loans.' You applied specifically for Lots 148 to 153,
162 „ 164,
83 „ 84,
199 „ 233,
169,
and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be equivalent of said amount of loan.

"2. This is a distinct and formal intimation that the *Port Canning Company* avail themselves of the privilege allowed to debenture holders by Article V. of the published conditions of the loan.

"3. No formal letter was sent to the *Canning Company* on receipt of their application placing the specified lots at their disposal, but on the 5th of January, 1866, the secretary to the municipal commissioners wrote to the secretaries of the *Canning Company*, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. *Kilburn*, another debenture holder, had applied for lots, and the commissioners could not tell Mr. *Kilburn* which of the lots were available until the *Canning Company* had made their selection.

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No reply was received from the *Canning Company* to this request, but in April, 1866, the secretary to commissioners addressed Mr. *W. C. Stewart*, acting on behalf of the *Canning Company*, on the subject. To this letter also no reply was returned.

"4. The lots applied for by *Port Canning Company* in commutation of their debentures have always been considered as transferred and held at the disposal of the *Port Canning Company*, and it now only remains for the leases to be completed and debentures to be sent into this office to the value of Rs.204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan.

"5. These lots being held available for the *Port Canning Company* at any moment, the commissioners are, by the application of the company, precluded from making any other use of the lots, and thereupon the commissioners must call on the company to return debentures representing the value of these lots, and to enter into the necessary formal engagements as to the conveyance of the land to them, under the 5th Article of the published conditions of the loan.

"Under the circumstances the municipal commissioners cannot be held liable for any interest which may accrue on the amount of loan represented by these lots, and the commissioners must look to the company in future for the payment of the rental due on the lots under the 5th Article of the published conditions of the loan.

"I am further directed to request that your company will without further delay select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the commissioners repudiate any liability to pay interest on the amount subscribed by the *Canning Company*, or to repay the loan, except in the shape of grants of land, as applied for by the company in their letter of the 13th March, 1865.

"I must, therefore, urge on behalf of the commissioners that you will select without further delay these lots, as they have received numerous other applications for lots in commutation of debentures, to which I can give no definite reply until the *Canning Company* act on the right of first selection, which is secured to them by their having been the first applicants."

On the 20th of December, 1866, Mr. *Schiller* wrote the following letter to the municipal commissioners:—

"To *J. R. Thomson*, Esq.,
"Secretary to the Municipal Commission, *Port Canning*.
"*Calcutta*, 20th Dec., 1866.

"Sir,—With reference to the debentures held by the *Canning Company*, which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date.

"This will involve the payment of interest by the municipality to the *Port Canning Company*, but the latter is prepared to declare now the lots they will receive in exchange for debentures and to pay a quit rent thereon, equivalent to the interest payable on their debentures. The municipality will thus lose nothing, and the arrangement will be a convenience to the *Canning Company*.

"I beg you will submit this proposal to the commissioners, and I trust they will give it their assent, and recommend its adoption to Government, whose sanction may possibly be required."

On the 14th of March, 1867, the municipal commissioners, by their vice-chairman, replied to that letter in the following terms:

"Dear Sirs,—With reference to the letter from Mr. *Schiller*, dated the 20th December, 1866, copy of which is on the other side, I am instructed by the chairman, Municipal Commissioners of *Canning*, to state that they agree to the proposal contained in that letter, and to request that you will at once declare the lots which your company will receive in commutation of the debentures taken by your company, so that the commissioners may know exactly the lots which they are bound to hold for the company."

On the 2nd of April, 1867, the company wrote as follows to the chairman of the municipal commissioners:—

"Sir,—In reply to your letter of the 4th [14th ?] of March, regarding the lots to be taken by this company in commutation of the debentures which you issued to us, we beg to inform you that the directors propose to take the following lots, which they think will amount to about the sum of Rs.250,200:—

"C to 10A, 27A, 28A, 29A, 33 to 38A, 48 to 50A, 83, 84, 85, 86, 151 to 162, 196 to 203.

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"The directors desire us to say that they expect permission will be granted to them to make an exchange of any of the lots for any others which may still remain in the possession of the municipality at any future period."

To this communication the vice-chairman of the commissioners replied on the 22nd of August, 1867, in the following terms:—

"To the Secretaries and Treasurers of the *Port Canning Company*.

"Gentlemen,—I am requested by the chairman to inform you that the lots specified in your letter of the 2nd April, 1867, are reserved for your company in commutation of the municipal debentures to their value, viz., subject to the sanction of Government:—

"Lots 6A to 10A	5 Lots	South of Railway.
„ 27A „ 29A	3 „	
„ 33A „ 38A	6 „	
„ 48A „ 50A	3 „	
Total	17 Lots	
"Lots 83 to 86	4 Lots	North of Railway.
„ 151 „ 162	12 „	
„ 191 „ 203	8 „	
Total	24 Lots	

"In all forty-one lots, which the commissioners deem to be equivalent to Rs.305,407 of loan.

"2. Your calculation as to lots is incorrect. The redemption into freehold is Rs.1,200 per beegah. I enclose the account according to the usual valuation of the municipal property.

"3. This concession is granted on the full understanding that the debentures to the above extent are to be returned at maturity, and that rent equivalent to the interest claimable on the said amount of debentures shall be paid for lots until the redemption into freehold tenure shall be completed. In the meantime the commissioners will be prepared to execute the necessary formal leases required, inserting a clause to give the required effect to the request conveyed in your letter, dated the 20th December, 1866.

"I have to add, that the commissioners will not object to your exchanging the lots named upon application for any others that may not be occupied by their own buildings or by other persons at the time such application shall be made."

On the 10th of January, 1868, the company sent to the municipal commissioners a bill for Rs.13,761, being the amount of interest accruing on the debentures from the 1st of January to the 31st of December, 1867, requesting payment thereof, and stating that if they would forward their rent account for the town lots registered in the name of the company it would be circulated to the directors. To this the chairman of the commissioners replied, stating that he would send a bill for their claim for the rent of the town lots as well as those selected by the company in lieu of the debentures, and pointing out that the latter were, by the agreement between the commissioners and the company, to be returned upon maturity, the interest thereon being set off against the rents of the lots selected.

On the 23rd of April, 1869, the company again demanded payment of the interest from January to December, 1867, and also for the year 1868, to which the Respondent, Mr. *Smith*, as chairman of the municipal commissioners, replied, pointing out that the interest was to be set off against the equivalent quit rent payable to the commissioners for the land allotted in lieu of the debentures, and offering, if they actually wanted to have the interest paid, to pay the same on receiving from the company payment of the counter claim.

On the 18th of May, 1869, the company, without any notice, commenced the present action against the Respondent, as chairman of the municipal commissioners, by filing a plaint in the High Court in its original civil jurisdiction.

The plaint sought to recover the interest due on the debentures held by the company for 1867 and 1868.

On the 5th of July, 1869, the chairman of the company filed a written statement setting out a copy of one of the debentures and a copy of the letter of the 23rd of April, 1869, claiming the interest.

On the 9th of August, 1869, the Respondent, as chairman of

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the municipal commissioners, also filed a written statement, by which he submitted that no interest could be recovered unless the company paid an equivalent sum in the shape of quit rent, which they had not done.

The company called three witnesses, and put in certain documentary evidence, amongst which were a letter demanding interest in August, 1867, and a reply from the vice-chairman of the commissioners, both of which letters were previous to the commissioners' letter enumerating the lots set apart for the company.

On the 23rd of August, 1869, Mr. Justice *Phear* gave a decree in favour of the Plaintiffs for Rs.27,522 with costs. The learned Judge was of opinion that there had been nothing in the correspondence to constitute an agreement by the Plaintiffs to pay rent for specified land equivalent to interest on the debentures in respect of which they sued. He also thought that the correspondence was not admissible in evidence for the purposes of the Defendants, because no part of it was registered. In the way in which Defendants desired to use this correspondence, it must amount to a lease of specified lands, or an agreement for a lease under such circumstances that rent mentioned in it had become a rent due to Defendants, and capable of being set off against Plaintiffs' claims. If it were a lease, inasmuch as completion of this contract did not take place till the letter of the 22nd of August, 1867, it must fall under the operation of the *Registration Act*, 1866, and under that Act a lease is one of the documents which must be registered, otherwise it could not be used in a Civil Court for any purpose. If it was an agreement for a lease, it must also be registered by reason of the interpretation clause.

The Respondent having appealed against that decree, the Chief Justice and Mr. Justice *Macpherson*, sitting in appeal, reversed the decision, holding that the proposal which Mr. *Schiller* made to the commissioners was a proposal by which the commissioners were to be relieved from any loss by postponing the exchange until the due date of the debentures. That the *Port Canning Company*, according to the terms of this proposal, were not to receive the lots immediately, but that the receipt of the lots by them was not to be complete until the debentures were exchanged for them;

but although they were not to receive the lots, they then agreed to declare the lots they would receive in exchange of the debentures, and to pay a quit rent thereon equivalent to the interest on the debentures. There was no stipulation whatever that the quit rent was not to commence until the lots should be exchanged for the debentures, but all they were willing to do was to name the lots they were to receive, and to pay a quit rent thereon. That the municipality on the 14th of March, 1867, accepted that proposal; and that the ascertainment of the lots to be taken over, and of their value, were matters left to be subsequently arranged, and the latter correspondence related to those matters only. Against that decision the present appeal was brought.

Mr. *Cowie*, Q.C., and Mr. *Doyne*, for the Appellants:—

The original offer of the Appellants was limited to the subscription for a certain amount of debentures, and the commutation of those debentures for land. Their offer for certain lots was quite clear, but it was not accepted. Up to the 22nd of August, 1867, there was no contract; and afterwards there could be none, for the letter of that date puts much more land on the Appellants than they ever offered to take; that is to say, it introduces a new term into the proposed contract. The Respondents asked the Appellants what lots they would take, and then assigned to them different lots. The Respondents confess and avoid; that is, they say that the Appellants agreed to forego interest on the debentures. They do not specify the date of the supposed agreement, nor for what period it would put an end to the claim for interest. A person alleging a contract must prove a simple acceptance of the proposal, without any new term. It was not a mere difference of calculation, for the amount of the subscription was fixed from the beginning, and the advance from £25,000 to £30,000 was a material variance. The question is whether the contract is contained in the two letters of December 20th, 1866, and the 14th of March, 1867; or whether the letters of April 2nd, 1867, and August 22nd, 1867, are to be read along with the two just named. The four together embodying the whole transaction. The letters of the 18th of September and the 20th of December, 1866, speak of interest and quit rent as future: "On the 20th of December, 1866,

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we proposed to declare what lots we would take, and to pay quit rent." It still remained as a proposal only, till the lots should be declared. In April the Appellants made the declaration, which the Respondent did not agree to. The interest was not to stop till the quit rent was ascertained. The quit rent could not commence till the lots were ascertained; and they never were finally agreed upon. If the correspondence is tendered as amounting to a contract, we say that under the *Indian Registration Act*, 1866, sect. 17, it is inadmissible as being unregistered, while it creates a future interest in land.

Mr. *Benjamin*, Q.C., and Mr. *J. D. Bell*, for the Respondents:—

The Appellants had secured the first choice of lots; they desired to have certain lots, the price of which would be more than the amount of their debentures. They made their proposal. They were asked what lots they preferred. They held back, not being sure which lots would be the best. On the 20th of December, 1867, they applied for indulgence, acknowledging their engagement, but giving the Respondents to understand that the debentures were more useful to them for the present than the land would be. The contract was then perfect; but had it not been so, the answer of the 14th of March made it a perfect contract. The Appellants were afterwards apprised by the letter of the 22nd of August, 1867, that they had applied for more than they were entitled to; that the price was higher than they had reckoned, and that they must pay the excess. The later correspondence relates merely to the execution of the contract. They never replied to the letter of the 22nd of August, 1867. There is no letter which justifies their setting aside the contract. A correspondence like this, even embodying, as it does, the terms of a contract, does not constitute such an instrument as the Act intended to be registered.

At the close of the argument their Lordships' judgment was delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

This is an appeal from a judgment of the High Court of Judicature at *Fort William* in *Bengal*. It arises in an action brought

by a land company, called the *Port Canning Land, Investment, Reclamation, and Dock Company*, against the Defendant, the chairman and representative of the Municipal Commissioners of the Town of *Canning*. The action is brought upon some debentures of the municipality which were given to the land company, and the claim in the action is for two years' interest, the interest being payable by half-yearly payments, from the 1st of January, 1867, to the end of December, 1868. The Plaintiffs have undoubtedly a perfect *primâ facie* case upon the debentures for that interest. The defence set up on the part of the municipality is, that there was an agreement come to between the land company and the municipality by which it was agreed that the debentures should be exchanged for land at the time when the debentures matured, which was a period of five years after their date, and that meanwhile, the exchange being alleged on the part of the municipality to have been completely contracted for, a quit-rent should be paid for the land equivalent to the interest which was accruing upon the debentures—the intention of the parties being that the interest should be extinguished by that agreement to pay the quit-rent.

The question in the appeal is, whether a complete and perfect agreement was come to between the parties to that effect. The case has been ably argued on both sides, with the result, which very often follows in a case properly argued, of reducing the point to be decided to a very narrow issue. The whole depends upon the correspondence; and the question is, whether the agreement relied on by the Defendants is established by some of the letters of that correspondence.

The company was formed, as appears by their prospectus, which has been referred to, for the purpose of obtaining land in *Port Canning*. The municipality appear to have considerable land in that town, and were desirous of making it a place of trade. They raised money by issuing debentures; but they gave the holders of those debentures the election to exchange them for land. That right of election is found in a notice which was issued by the municipal commissioners when they invited tenders for the loans upon these debentures. The 5th article of that notification is this:—"Debenture holders are to be entitled to convert their debentures, to the extent of one-half of the entire loan raised,

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into leasehold titles to lands in the town within a period of two years from the issue of the debentures, at the rate of Rs.600 of loan for one beegah of ground. Such privilege of conversion to be given to debenture holders in order of the dates on which applications for such conversion are received by the commissioners. The leasehold title so conferred to be for sixty years on a rental of Rs.30 per beegah per annum." Then a further option is given: "Such leaseholders to be further allowed to convert their leasehold into freehold tenures by a cash payment at the rate of Rs.600 per beegah, provided such privilege be claimed within four years from the 1st of January next."

The Plaintiffs, the land company, agreed to subscribe $2\frac{1}{2}$ lacs of rupees and 200 rupees. That subscription was evidently made by them with the intention of exchanging the debentures they would obtain for land; for by a letter of the 13th of March, 1865, written before the debentures were issued, the company declared their desire to take land in lieu of them to the full amount of the loan.

Very soon after the debentures were issued, a correspondence commenced between the company and the municipal commissioners, with the object of effecting the conversion. The letters on both sides are unbusinesslike. Letters are written and left without an answer, and then a fresh departure is made without reference to preceding letters. That correspondence, in the way in which it has taken place, no doubt imposes some difficulty upon those who have to construe it; but, as I have already said, after the matter has been threshed out it really appears that the point is a very simple one. The first letter relating to the conversion, after the issue of the debentures, is on the 5th of January, 1866. It is a communication from the commissioners to the company, and is a spur to the company to exercise their option, if they mean to do it, of taking land. It is this: "Dear Sirs,—Mr. *Kilburn* having applied to have certain lots out of the following numbers assigned to him on freehold title in exchange for debentures, viz., Nos."—naming several numbers,—"I shall feel obliged by your intimating what lots amongst these numbers your directors desire to select and retain for the company, so as to enable me to inform Mr. *Kilburn* what lots will be available to

him for redemption." It seems no answer was given, but there was some intermediate correspondence respecting an alteration in the debentures, which it is immaterial to consider. The next letter is again from the commissioners to the company, of the date of the 18th of September, 1866. "Gentlemen, I am directed by the chairman to request that you will give your immediate attention to the following:—On the 13th of March, 1865, the *Port Canning Company* through you applied distinctly to have lots assigned to them in lieu of the debentures which are to be given for the amount subscribed by them to the loans. You applied specifically for lots,"—naming them—"and asked for other land in lots adjacent to the proposed new dock, and such other lots near to the railway, or in other desirable situations, to such an extent as may be the equivalent of said amount of loan." "This is a distinct and formal intimation that the *Port Canning Company* avail themselves of the privilege allowed to debenture holders by Article V. of the published conditions of the loan." The commissioners thus directly intimate to the company the construction they put upon their letter, viz. that they had elected to take land to the full value of their debentures. The letter goes on:—"No formal letter was sent to the *Canning Company* on receipt of their application placing the specified lots at their disposal; but on the 5th of January, 1866, the secretary to the municipal commissioners wrote to the secretaries of the *Canning Company*, requesting that they would intimate what lots they required among certain numbers specified in the letter, as Mr. *Kilburn*, another debenture holder, had applied for lots, and the commissioners could not tell Mr. *Kilburn* which of the lots were available until the *Canning Company* had made their selection. No reply was received from the *Canning Company* to this request, but in April, 1866, the secretary to the commissioners addressed Mr. *W. C. Stewart*, acting on behalf of the *Canning Company*, on the subject. To this letter also no reply was returned." Then they refer to another letter having been written—"The lots applied for by *Port Canning Company* in commutation of their debentures have always been considered as transferred and held at the disposal of the *Port Canning Company;* and it now only remains for the leases to be completed and debentures to be sent into this office to the value of

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Rs.204,928, being the amount of the loan which these lots represent under the 5th Article of the published conditions of the loan." Then the letter goes on to urge the completion of the exchange—"I am further directed to request that your company will, without further delay, select such other available lots as may be required to make up the redemption of the entire sum subscribed by them to the loan, and to give notice that the commissioners repudiate any liability to pay interest on the amount subscribed by the *Canning Company*, or to repay the loan, except in the shape of grants of land, as applied for by the company in their letter of the 13th March, 1865." There is thus a most distinct intimation on the part of the municipal commissioners that they hold and treat the *Port Canning Company* as having applied for an exchange of the whole of their debentures for land; that the company have only selected lots which amount to a part of the whole amount of their debentures; that they require the company to select the other lots and send in their debentures; and expressly give notice that from that time they do not consider themselves liable to pay interest.

Then come the two important letters, which cannot be fully understood without referring to this previous correspondence. The letter of the 20th of December, 1866, is from Mr. *Schiller*, who represents the *Land Company*, to the commissioners:—"Sir, with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land,"—thus in answer to the letter, the effect of which I have given, which refers to an agreement, this letter also refers to the exchange as a thing agreed on,—"with reference to the debentures held by the *Canning Company*, which I agreed to exchange for land, I now beg to propose that such exchange be deferred till their due date." That proposal, as Mr. *Benjamin* says, is an application for an indulgence. The commissioners were pressing for an immediate exchange and that interest should stop, and this is a counter-proposition:—"I know I have agreed to that, but, if you will consent, I wish to have the exchange postponed until the debentures become due." And then comes this proposal of what the company will do, so that the commissioners shall be under no loss, and shall not be liable to the interest in the meantime:—"This will involve the payment of interest by

the municipality to the *Port Canning Company*;"—of course this would be so; for the debentures being still extant interest would be payable upon them;—"but the latter is prepared to declare now the lots they will receive in exchange for debentures, and to pay a quit-rent thereon equivalent to the interest payable on their debentures. The municipality will thus lose nothing, and the arrangement will be a convenience to the *Canning Company*." They really say this: If you will, for our convenience, postpone the exchange of the debentures for land till the debentures become due, you shall be no loser; we shall not receive the interest, for we agree to pay you a rent which will be equivalent to it, and therefore one will extinguish the other. That is a distinct proposition. The fair meaning and substance of the whole letter is, we have agreed to take lots to the full amount of the debentures; and if you will consent to the exchange being postponed until the debentures become due, we will not call upon you for the payment of interest in the meantime, and we are now willing to make the selection. But the selection lay with the company; it might be for their interest to make it then, or it might be more for their interest to make it at a future time. The answer comes on the 14th of March, 1867, from the commissioners:—"Dear Sirs, with reference to the letter from Mr. *Schiller*, dated the 20th of December, 1866, copy of which is on the other side, I am instructed by the chairman of the municipal commissioners of *Canning* to state that they agree to the proposal contained in that letter." That proposal I have already interpreted, and there is a distinct acceptance of it. Then they add, "and to request that you will at once declare the lots which your company will receive in commutation of the debentures taken by your company, so that the commissioners may know exactly the lots which they are bound to hold for the company." The agreement was perfect,—that there should be an exchange; that the time of exchange should be postponed till the debentures became due, no interest being payable in the meantime, and the company being at liberty to select the lots they desired to take. Their Lordships think that the latter part of the letter as to the selection of the lots is not a part of the contract requiring further affirmance to bring the parties to a complete agreement, but relates to the execution of that which they had agreed upon.

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The two following letters, which it was Mr. *Cowie's* object to make a part of the agreement (his contention being that it was not perfected by the previous ones), appear to their Lordships to be only an attempt to carry it into execution. There is a selection of lots on the part of the *Port Canning Company*, and an intimation from the municipal commissioners that the company had made a selection which was not in accordance with the contract. The letters are the letter of the 2nd of April, and the answer of the 22nd of August. They really amount to this:—The letter of the *Land Company*, professing to carry out the agreement, says:—"We have selected these lots, which are the lots we are willing to take in pursuance of the agreement of exchange for the debentures, and which we think are about the amount of the debentures." The commissioners' answer is, "Well, we have no objection to your having those lots, but we are bound to tell you that you cannot have them for the debentures you now hold, because their value is half a lac more than the amount of those debentures, but we have no objection, if you will return debentures and pay quit rent upon the value of the additional lots, that they shall go to you." That proposal has never been accepted; but the non-acceptance of that proposal, and its being left in an imperfect state, both parties being at liberty to refuse, the one to take, and the other to give in exchange the further quantity of land, cannot affect the previous agreement to exchange the debentures then held by the company for lots equivalent in value to their full amount. That agreement was already made, and in their Lordships' view all that remained to be settled was the execution of it by the selection of the lots in accordance with the contract. The case is in this view extremely simple. It is an agreement to exchange, where on the one side the thing to be exchanged is already defined and specified, and where that which is to be taken in exchange is to some extent indefinite and requires a further act to ascertain it. Suppose *A.* and *B.* had agreed to make an exchange of this sort; *A.* agrees to give *B.* six cows, specific cows, in exchange for six horses which he is at liberty to select out of the stock then upon *B.'s* farm, the selection to be made at a future time; that is a perfect agreement for the exchange, and all that remains is that *A.* should select the horses on *B.'s* farm. There might be a dispute whether

the horses that were upon the farm at the time of the agreement had not been removed, and others substituted; they might differ as to the horses which were intended to be taken in exchange; but that would not affect the agreement, but would be a question of the mode of performance of it.

A question was raised, whether the letters did not form an agreement which should have been registered under the *Indian Registration Act;* but their Lordships think that the High Court was perfectly right in holding that the letters did not require registration. They do not amount to a lease or an agreement for a lease, but are evidence of a contract of a special character, not coming within any of the definitions found in the *Registration Act.*

On the whole, therefore, their Lordships think that the judgment of the High Court, which reversed the judgment of Mr. Justice *Phear*, is correct; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal, with costs.

Solicitors for the Appellants: *J. S. & A. P. Judge.*
Solicitors for the Respondent: *Clarke, Son, & Rawlins.*

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MUNNOO LALL . . . . . APPELLANT;

AND

LALLA CHOONEE LALL, AND OTHERS . . RESPONDENTS.

EX PARTE (1).

On Appeal from the High Court of Judicature at Fort William, in Bengal.

A person who has represented to an intending purchaser of land that he has not a security over that land, and induced him, under that belief, to buy, cannot as against that purchaser subsequently put his security in force.

The Judicial Committee will not disturb the concurrent finding of two Lower Courts on a question of fact.

IN this suit, which was commenced on the 30th of April, 1867, the Appellant was Plaintiff. He sued in the Court of *Shahabad* against the Respondents and one *Reep Bhunjun Singh*, alleging that the last-named Defendant had, by a mortgage bond dated the 9th day of October, 1863, pledged to the Appellant, as security for the repayment of Rs.20,000, certain mouzahs, including Mouzah *Shahpore*. The plaint went on to allege that the mouzahs other than *Shahpore* had been sold in satisfaction of earlier mortgages, but that, as regards Mouzah *Shahpore*, it had been conveyed to Respondents under conveyances subsequent in point of date to the Appellant's mortgage, and all dated the 9th of August, 1864. The Appellant consequently prayed for satisfaction of his mortgage, principal, and interest, by sale of the Mouzah *Shahpore*.

The Respondents, by their written statement, filed on the 23rd of July, 1867, in the first place contended that the Appellant's mortgage was a collusive transaction, that there was no real consideration for it, and that it had been fraudulently brought into existence subsequent to the sale of *Shahpore* to the Respondents; that the sale to the Respondents had taken place in full

* *Present:* THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

(1) The Respondent had put in his printed case, but was not represented at the hearing.

publicity, and in consideration of a large sum of money, and in consultation with the Plaintiff and his son; that the mortgage bond in favour of the Appellant had been fraudulently brought into existence at a time when the property was under legal attachment. The Respondents further pleaded that certain liens claimed by them respectively over the property were continuing securities, and had priority to the Appellant's alleged mortgage, and also that the sale which was subsequently made to them of the property was in satisfaction of the debts covered by those securities.

The Judge of *Shahabad* laid down eight issues, of which the following were the most important:—

"1. Is the mortgage deed under which the Plaintiff sues genuine, or is it collusive and without consideration?

"2. Was its existence intentionally kept secret from the Defendants at the time of purchase?

"3. Was the litigated property under legal attachment at the time of the execution of the mortgage deed; and if so, was the deed thereby rendered nugatory?"

The Judge, having at the request of the vakeels first tried the third issue, pronounced his judgment and decree in the suit on the 16th of September, 1867, giving the Appellant a personal decree against the Defendant *Reep Bhunjun Singh*, but dismissing the suit, or, as the Judge expressed it, releasing the Respondents from the claim, finding "that the mortgage to Plaintiff, being an alienation of property under attachment by the Civil Court, was, *ab initio*, null and void, and that the Plaintiff's claim to have the property in question sold must be thrown out."

From this judgment and decree the Appellant appealed to the High Court. The appeal was decided on the 9th of May, 1868, by a Division Bench. The senior Judge held that the mortgage in favour of the Appellant was an alienation within the meaning of the 240th section of the *Code of Civil Procedure* (1), and as such was void as against all the world. The other Judge held that the mortgage as an alienation was void only as against the attaching creditor, and as respects proceedings taken under the attachment. He thought that the attachment did not give effect to a subsequent

(1) Act VIII. of 1859.

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private alienation by the debtor in favour of the attaching creditor. As the opinion of the senior Judge was in favour of confirming the decision of the Lower Court, the result was that the appeal was dismissed with costs.

Under sect. XV. of the charter establishing the High Court the Appellant filed his appeal from the last-mentioned decree, and such appeal came on to be heard before a full bench, on the 4th of September, 1868. The Court, without expressing any opinion on the points of law as to which there had been a difference of opinion between the Judges of the division bench, remanded the case under section 354 of the *Procedure Code*, with the following remarks:—

"It seems that after the last of the Plaintiff's witnesses had been examined (we do not know that that witness was actually the last witness whom the Plaintiff intended to produce) it was stated by the Judge that 'before going into the merits of the case generally it was urged that the third issue should be tried, as to whether at the time of the mortgage the property was under attachment; and if so, whether the mortgage is thereby rendered null and void.'

"The Judge proceeded to determine that issue, and decided it against the Plaintiff. We think that the Judge was wrong in deciding that a sale or alienation pending an attachment is absolutely null and void under all circumstances and as regards all persons. Whether the mortgage was void under the facts as disclosed in this case, we do not now determine.

"We think it right to send the case back to the first Court, to try the two first issues which were laid down by the introduction of the words 'by the Plaintiff' in the second issue. They are as follows: first, is the mortgage deed under which Plaintiff sues genuine, or is it collusive without consideration; and secondly, was its existence intentionally kept secret from the Defendants (by the Plaintiff) at the time of purchase. If the Judge decide the second issue in favour of the Plaintiff, he will lay down and try the following issue, viz., whether the Defendants other than *Reep Bhunjun*, or any and which of them, had, at the time of their purchase respectively, any and what knowledge or notice of the alleged mortgage to the Plaintiff.

"The case is remanded to the Judge under sect. 354 of the *Code of Civil Procedure*. That section enacts: 'If the Lower Court shall have omitted to raise or try any issue, or to determine any question of fact, which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue or question of fact, the Appellate Court may frame any issue or issues for trial by the Lower Court, and may refer the same to the Lower Court.'

"We think that under the circumstances, and looking to what the Judge has said, the case should go back to the Judge to try the three issues above laid down. The Judge will allow either party to adduce any further evidence which they may wish, and to examine any witnesses whom they may produce, including the witnesses who have been already examined, and to take such measures for obtaining the attendance of any such witnesses as may be necessary. The Judge will return his finding on these issues to this Court, together with the evidence, and either party will be at liberty to file objections to the finding of the Judge."

On the remand the case was further investigated by the Judge of *Shahabad* on the issues as amended by the full bench. He only dealt with the issues as to the genuineness of the Appellant's mortgage, and the question whether the existence of such mortgage had been concealed by him from the Respondents. The Judge examined witnesses produced by both sides, and also himself called and examined *Beharry Lall*, a gomashta in the employ of the Appellant. Four witnesses who were examined on behalf of the Respondents deposed that when the preliminaries of sale of August, 1864, were under consideration the vendees (Respondents) closely interrogated the Appellant as to whether any liens other than decrees of Courts existed on the property, and they received replies in the negative. The Judge gave his decision on the 18th of June, 1869, and found on the first issue that the Appellant's mortgage was collusive and without consideration; and on the second issue, as to whether the Appellant had concealed the existence of his mortgage from the Respondents, he made the following remarks, and finding:—

"Next with regard to the 2nd issue—

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"Was the existence of the bond intentionally kept secret from the Defendants by Plaintiff at the time of purchase?

"To prove this fact in the affirmative, Defendants have examined four witnesses. The gist of their evidence goes to shew that when the preliminaries of sale were under consideration the vendees closely interrogated the vendors and also Plaintiff as to whether any liens other than decrees of Court existed on the property, and received replies in the negative.

"Against this evidence is that of Plaintiff's witnesses, who swear directly to the contrary, to wit, that when the sale transaction was on the *tapis* mention was made of the lien in suit, and that the vendees were very well aware of its existence—in fact, had a copy of the bond in their possession—Defendant No. 9 being, moreover, at the time general manager of the vendor's affairs.

"After careful review of the conflicting evidence thus adduced the Court is firmly of opinion that the witnesses who have testified on behalf of Defendants are the most to be credited, their statements being fairly consistent and seemingly truthful, as characterised by their favourable demeanour whilst under examination."

The Appellant, under sect. 354 of the *Code*, filed his memorandum of objections to the last-mentioned finding of the Judge of *Shahabad*.

The case came again for hearing, before the full bench of the High Court, on the 6th of December, 1869, when the three Judges constituting the Court held that the Appellant's mortgage was proved not to be collusive or without consideration, and they consequently reversed the finding of the Judge on the first of the two issues which the Judge had tried on the remand; but on the second issue —viz., whether the Appellant had intentionally kept secret the existence of his mortgage from the Respondents at the time of their purchase—the Court unanimously affirmed the finding of the Lower Court.

In his judgment on this second issue the Chief Justice remarked as follows:—

"The next question is, was the existence of the mortgage to Plaintiff intentionally kept secret by him from the Defendants at the time of the purchase by them. Upon that issue it appears to me that the Judge of the Lower Court has come to a correct con-

clusion. Whatever may have been the object of Plaintiff in keeping that deed secret from the Defendants—whether it was that he expected to be paid by *Reep Bhunjun Singh* out of the purchase-money received from the Defendants, or whether it was that by some arrangement between him and *Reep Bhunjun Singh* his mortgage was to be paid out of the sale of other estates, it is unnecessary to determine.

" It is clear upon the evidence of some of the witnesses, to whose evidence the Judge has attached credit, that *Munnoo Lall*, the Plaintiff, was present when the deed to *Reep Bhunjun Singh's* co-Defendants was executed by *Reep Bhunjun Singh ;* that at the time when the deed was executed the Plaintiff and his son were both asked whether there were any charges on the estate, and that they answered in the negative, upon which the purchase was completed, the deed executed, and the consideration money paid to *Reep Bhunjun Singh.*

" *Jugmundul Dass*, one of the witnesses who were called by the Judge himself, says, 'I consulted in the matter' (that is, the matter of the purchase), 'with *Byjnath Sahoy* and *Munnoo Lall*, at *Mahabeer Pershad's* kotee. This was some five or six days before. I asked them whether any liens save decrees of Court existed on the property, and they said no. I made no further inquiries in the matter from any one, having reliance upon what the baboos had told me. The witness proceeds, " the preliminaries of sale were completed at *Reep Bhunjun Singh's* house on 11th Sawun, 1271. The other purchasers were present. *Munnoo Lall* and *Byjnath* were there. They, on being asked again, denied any other lien save decrees executed on the property.

" *Junnassur Dass*, another of the witnesses who were called by the Judge, says:—'The sale was matured and completed at *Reep Bhunjun's* house. *Byjnath* and *Munnoo Lall* were present. *Mahabeer Pershad* asked them and *Reep Bhunjun* and *Gooman Bhunjun*, whether any other lien save decrees of Court were extant on *Shahpore*. They all answered in the negative on more than one occasion. On those occasions, *Munnoo Lall* and *Byjnath* consulted sundry papers before replying in the negative.' The same witness also says:—" I was unaware of the bond for Rs.20,000 being in existence when I offered to buy the 5½ annas' share. I made no

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further inquiries, directly or indirectly, after *Munnoo Lall* declared no liens, save decrees, were existing on the property.

"Now it is not at all unreasonable to suppose that *Munnoo Lall* and his son were present at the time when *Reep Bhunjun* was executing a conveyance of the property to others; for it appears that *Munnoo Lall* acted as banker and adviser of *Reep Bhunjun Singh*. He had been in the habit of advancing money on his account, and, considering that *Reep Bhunjun Singh* was in a state of pecuniary difficulties, it is not at all improbable that persons in the neighbourhood, who were aware that *Munnoo Lall* was in the habit of advancing moneys to *Reep Bhunjun Singh* should, when they came to advance money on the security of the property, inquire of the Plaintiff, who of all others was likely to have a lien on the property, if there were any such liens.

"The Judge says—'After careful review of the conflicting evidence thus adduced, the Court is firmly of opinion that the witnesses who have testified on behalf of Defendants are the most to be credited, their statements being fairly consistent and seemingly truthful as characterised by their favourable demeanour whilst under examination.'

"The evidence of these witnesses is to some extent corroborated by the evidence of the Plaintiff's own witnesses.

"*Sheogolam Lall*, one of the Plaintiff's witnesses, says: 'When the kobalas were executed mention of the existence of the lien held by *Munnoo Lall, Luchmee Narain, Busgeet Tewaree, Kewul Dass*, and others whose names I forget, was made by the buyers and sellers.' Now, although the witness says that mention of the existence of *Munnoo Lall's* lien was made, it is much more probable, in my opinion, that they were informed that Plaintiff had not any lien on the property than that he had; for if the Defendants had been informed of the lien, it is not probable that they, as vendees, would have paid their money to *Reep Bhunjun Singh* when they knew that another man had a lien on the very estate which they were going to purchase. But in his cross-examination this witness appears to me to give a good reason why the Plaintiff did not mention that he had a lien. He was asked if the Plaintiff's lien was mentioned in the kobalas to the Defendants, and he says:—'There was no mention in any of the kobalas of the lien

held by Plaintiff; the reason was that *Munnoo Lall's* money was to be paid by the sale of other villages.' Now, if there was an arrangement between *Munnoo Lall* and *Reep Bhunjun Singh* that the Plaintiff's mortgage was to be paid off by the sale of other villages, and that Mouzah *Shahpore* was not to be sold subject to his lien, the whole case is consistent, and we have not the case of fraud and conspiracy which must have existed if the case of the other side was correct, viz. that *Reep Bhunjun* sold to the Defendants and received the purchase-money from them with the intention of setting up a fictitious deed in the name of the Plaintiff for the purpose of taking the property out of the possession of the Defendants when the purchase-money had been received.

"Another witness of the Plaintiff, named *Lalla Nundbeharee Pershad*, said:—'No mention of Plaintiff's claim was made in the kobala, as it was conjectured that the same would be satisfied in another way.' This is quite consistent with the evidence given by the Defendant's witnesses when they said that when *Munnoo Lall* was asked if he held any lien on the estate he answered in the negative. He expected that his bond would be satisfied by the sale of other villages or in some other way. This witness also shews that an intimacy existed between *Munnoo Lall* and his son and *Reep Bhunjun Singh* and his brother. He says that he was a mooktear, and got a salary from the wife of *Reep Bhunjun Singh* for doing miscellaneous work, and adds that, '*Munnoo Lall* and *Byjnath Sahoy* are on terms of intimacy with the baboos. *Reep Bhunjun* drew his money supplies from *Munnoo Lall* up to 1865.'

"I have alluded, with regard to the first issue, to the period which the Plaintiff allowed to elapse between the date of the lease to the Defendants and the date of filing his plaint, as being inconsistent with the fact that the deed to Plaintiff was a collusive deed for the purpose of taking the property from the Defendants; but although the time which Plaintiff allowed to elapse between the date of sale and the institution of his suit was a strong fact against the first issue as to collusion, it is also, I think, a strong fact in favour of the affirmation of the second issue, viz., that he did not intend to set up his lien, and that he did tell the Defendants, as sworn to by the Defendant's witnesses, that no other lien existed.

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"There is very little doubt that Plaintiff did know of the sale to the Defendants on 9th August, 1864, and, if he had intended to rely upon his lien under the deed of 1863, it is not very probable that he would have allowed nearly four years to elapse after the Defendants had been let into possession without taking steps to enforce his deed and to assert his prior lien as against them.

"The Plaintiff was not called in support of his own case, nor did he tender his evidence. It is said that he is an old man, and that his affairs are managed principally by his son *Byjnath Sahoy*, but, although he may be an old man, he is not too old to know whether he was present when *Reep Bhunjun* sold to the other Defendants or not, as sworn to by the Defendant's witnesses, or whether he did or did not on that occasion tell the Defendants that there was no other lien on the property. The Defendants in their written statement, set up, that the purchase made by them was made in consultation with the Plaintiff and his son, and with due caution. They called witnesses, who have proved the truth of that assertion. The Judge speaks of those witnesses as the most to be credited, and says that their evidence is seemingly trustworthy, and was characterised by their favourable demeanour whilst under examination.

"The Plaintiff's son was called as a witness; but, although that defence was set up by the Defendants, he appears not to have been asked whether he was present at the time of the sale, or whether that conversation took place to which the witnesses of the Defendants have deposed, and in which he and his father are said to have stated that no liens existed against the property.

"It appears to me that, on the evidence, the Judge came to a right conclusion on the second issue, and that that finding must be upheld. I think that this appeal should be dismissed, though on different grounds from those given by the Division Bench. The result is that the first decision of the Lower Court is affirmed. The Appellants will pay the costs of the appeal and the costs of the trial upon the remand."

The decree of the Full Bench, which bears date the 6th of December, 1869, affirmed the decision of the Lower Court, and dismissed the appeal with costs.

From this decree the present appeal was brought to Her Majesty in Council.

The appeal now came on to be heard *ex parte*, the Respondents not appearing.

Mr. *Leith*, Q.C., and *J. H. W. Arathoon*, for the Appellant:—

The mortgage of 1863 was registered at once in the public register of the district, under the *Registration Act* of 1843, and thereby acquired priority over all mortgages not then on the register. Registration would be of no avail if it could be nullified by subsequent oral declarations of the parties. This mortgage was granted in consideration of debts under decrees held by the Appellant, and also in part for cash down. There had been many loans and securities, the Appellant being the banker of the mortgagor. There was no proper answer nor issue to put us on our defence on the point of misrepresentation. The issues were, first, whether the mortgage was collusively made; secondly, whether its existence was intentionally kept secret from the Defendants; and the Court of first instance only inquired into the third; viz., whether our land was under attachment. The second issue was not at first decided by the High Court on appeal, but was merely remanded for trial. Therefore we filed no new grounds before the judge. No doubt the purchaser paid full consideration, but the registration had rendered our previous mortgage patent to all the world, and ought to have been full notice to a careful purchaser. The Appellant's son was indeed examined afterwards by the Judge, and did not contradict the statement of the witnesses for the opposite party, but it was on other points, and not on the second issue, that he was examined, and the cross-examination was confined to the first. Then others were examined on the first and second issues, but they were examined by the Judge himself. There is a conflict of testimony, and our evidence is the stronger.

The judgment of their Lordships was pronounced by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

This appeal has been heard *ex parte*, and after considering the opening of Mr. *Leith*, which has been made in a fair and candid

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manner, it appears that there are concurrent findings of two Courts below upon a question of fact decisive of the case, and decisive of it against the Appellant.

The circumstances are very short. It appears that a man of the name of *Reep Bhunjun Singh* was in debt, and at the time possessed some considerable estates. The Appellant *Munnoo Lall* had been his banker and advanced money to him, and, amongst other securities, he held a mortgage of the date of the 9th of October, 1863, from *Reep Bhunjun Singh*, of Mouzah *Shahpore*. It was an ordinary mortgage to secure the sum of Rs.20,000. Subsequently to that mortgage, on the 9th of August, 1864, *Reep Bhunjun Singh* sold the mouzah to the Respondents, or to those whom the Respondents represent, the bulk of the consideration given for the purchases being the money which was due to the purchasers from *Reep Bhunjun Singh*, for which they had obtained decrees. Besides the amount of the decrees, a small sum was paid on each of the purchases in cash. Four years after these purchases the Appellant commenced this suit, which is a suit to enforce payment of his mortgage bond against the Respondents, and prayed a sale of the mouzah. The defence set up by the answer, amongst others, was the equitable defence that *Munnoo Lall* could not enforce his mortgage bond as against these Respondents because at the time of their purchase he had been present when the negotiations for the purchase took place, and in answer to inquiries, had led the purchasers to believe that he had not any lien upon the estate, consequently that he had not the mortgage bond which he sets up in this suit. The defence is made in the answer, as Mr. *Leith* observed, in not very precise terms, but they say that the purchase was made in consultation with the Plaintiff and his son, and at that consultation they were led to believe that there was no such lien as the mortgage of 1863.

The issues were settled, and two only of them are material. The first was that the bond was altogether collusive and made without consideration for the purpose of defeating any subsequent purchasers; and the second, which has become the material one, is "Was its existence"—that is, the existence of the mortgage deed —"intentionally kept secret from the Defendants at the time of the purchase?" There was a third issue, which raised the ques-

tion whether, the litigated property being under attachment at the time of the execution, the mortgage deed was thereby rendered nugatory. Upon the first trial of these issues, the Judge of *Shahabad*, having found the third issue against the Plaintiff, was of opinion that it decided the cause, and that it was immaterial for him to determine the other issues. However, on appeal to the High Court, that Court reversed the judgment of the Judge of *Shahabad*, and remanded the case for trial upon the first two issues to which attention has been called, and amended the second issue by inserting the words, "by the Plaintiff" after the words "was its existence intentionally kept secret." The parties went down to try that issue, which was in effect whether the Plaintiff had intentionally and designedly, and with a view to deceive the Defendants, kept the existence of his mortgage secret from them. That issue raises a pure question of fact. It appears that there was evidence on both sides, the witnesses on behalf of the Respondents giving testimony that the negotiations took place in the presence of the Appellant *Munnoo Lall;* that inquiries were made whether he had any mortgages, it being expected from his relation to the vendor that he might have them, and that in answer to those inquiries he distinctly stated that he had none; and documentary evidence was also given in support of the affirmative of the issue. Some evidence undoubtedly was given on the other side of a contrary character. The Judge of *Shahabad*, who heard the witnesses, has given credit to those who were called on the part of the Defendants. He distinctly gives credit to them, and he thinks that their evidence is corroborated not only by the documents but by the probabilities of the case. On appeal to the High Court, the High Court affirmed his finding, after much consideration given by themselves to the evidence. The Chief Justice, who analysed the evidence given by the witnesses, has pointed out various circumstances which appear to him to corroborate them. The learned Chief Justice thought that *Munnoo Lall* was present at the time of the negotiations, and that inquiries were made of him. Their Lordships think it is a natural conclusion to draw from all the circumstances that some inquiry would have been made of him, and they think it must be pretty evident from the whole circumstances of the case that if the Defendants had had notice of the

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mortgage held by the Appellant, they would have hesitated to purchase as they did. They took the estate, giving up their decrees, and also an attachment which they held. Their Lordships agree with what is stated by Mr. *Leith*, that there may have been no duty upon *Munnoo Lall* voluntarily, and without being asked, to disclose his security, but the case is not put simply upon the omission to give notice, but upon an actual misleading of the Defendants, not merely by the acts, but by the express declarations of *Munnoo Lall* himself.

Under these circumstances their Lordships think that they could not have departed from their ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had felt some doubt upon the finding. But after the discussion of this case, their Lordships are disposed to agree with the findings of the Court below.

If then the issue has been properly found, it is really decisive of the case, because it supports the plain equity, that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot as against that purchaser subsequently attempt to put his security in force.

The result is that their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with the costs incurred by the Respondents previous to the hearing.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondent: *Barrow & Barton.*

RANI MEWA KUWAR . . . . . APPELLANT;

AND

RÀNI HULAS KUWAR . . . . . RESPONDENT.

J. C.*
1874
Jan. 30, 31, Feb. 3

On Appeal from the Court of the Judicial Commissioner, Oudh.

Immoveable property partly situated in *Rohilcund* and partly in *Oudh*, which had formerly belonged to the common ancestor of the Appellant and the Respondent, was claimed by each on the ground of heirship. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in *Rohilcund* but not in *Oudh*, where the Respondent was, and continued, in possession. At the end of nine years from the date of the deed of compromise the Appellant sued for possession of her share of the property in *Oudh*.

The Judicial Commissioner of *Oudh* having decided that the suit was founded on the contract contained in the deed of compromise or for a breach of it, and, therefore, barred by the *Indian Limitation Act*, XIV. of 1859, s. 1, clause 10. It was

Held (reversing this decision), that the claim did not rest on contract only, but on a title to the land acknowledged and defined by the contract, which was part only of the evidence of the Appellant to prove her case, and not all her case; and that, consequently, the suit was not founded on contract or for a breach of it, but was a suit for the recovery of immoveable property "to which no other provision of the Act applies," and, therefore, subject only to the limitation of twelve years prescribed by s. 1, clause 12 (1).

THIS was an appeal from a judgment and decree passed on regular appeal by the Judicial Commissioner of *Oudh*, and dated the 19th September, 1871, whereby the Appellant's suit was dismissed on the ground that it was barred by the law of limitation. The suit was brought in the Court of the Civil Judge of *Lucknow*, in order to obtain full possession of a certain share, to wit, 8½ annas' share, in certain immoveable property situated in *Lucknow*, which had belonged to the common ancestor of both the Appellant and the Respondent, or the parties they represented.

The rights of inheritance in the property now in question, together with other property of the common ancestor situated in

* *Present*:—THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, and THE RIGHT HON. SIR ROBERT P. COLLIER

(1) See the present *Indian Limitation Act*, IX. of 1871, sched. 2, art. 145.

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the province of *Rohilcund*, had formed the subject of dispute previous to 1860, and in July of that year a deed of compromise was entered into between the present Appellant, her sister (whose rights she had since inherited), and a cousin (now represented by the Respondent), to divide the whole property in certain proportions. By a second deed, dated in November, 1860, all the parties to the former deed acknowledged that a division of property had taken place in accordance with the former deed, but it was matter of contest in the cause whether the deed of November, 1860, comprised the *Lucknow* property, or had reference only to the property in *Rohilcund*. The Respondent, or his predecessors, had held possession of the *Lucknow* property from a date prior to July, 1860. The plaint was filed on the 5th of November, 1869.

The Civil Judge dismissed the suit on the ground that the Appellant was estopped from obtaining the relief she sought by the deed of November, 1860, which he regarded as comprising the property in *Lucknow*. On appeal the Judicial Commissioner reversed this decision, and directed the case to be tried on the merits.

When the case was heard on remand, the Civil Judge dismissed the Appellant's suit on the ground that she had not been in possession at any time during the last twelve years. The Judicial Commissioner, on a second appeal, was of opinion that this fact was not material, and that the deed of November, 1860, did not comprise the property in *Lucknow*, but he held (the point, apparently, not having been raised before him) that after the execution of the deed of July, 1860, the titles of the several parties rested not on inheritance but on contract, and that the suit was barred, whether the three years or the six years' term were held applicable.

Mr. *J. H. W. Arathoon*, for the Appellant (1):—

The deed of November, 1860, did not comprise the *Lucknow* property; a certain house in *Lucknow*, occupied by the Appellant, was acquired by her father, and did not form part of the estate of

(1) The Counsel for the Respondent asked their Lordships to hear the whole case, which was accordingly gone into, no objection being raised by the Appellant's Counsel.

the common ancestor, and therefore her occupation of it does not shew, as the Respondent alleged, that a division of his property in *Lucknow* had taken place. The present suit being for immoveable property, is not barred by any shorter limitation than that of twelve years, according to the *Indian Limitation Act*, XIV. of 1859, s. 1, clause 12.

Mr. *L. W. Cave*, and Mr. *Horace Smith*, for the Respondent:—

There is evidence that the Appellant was actually occupying part of the family property in *Lucknow*, which proves that it had been divided. Upon the right construction of the deed of November, 1860, it does comprise the *Lucknow* property, and constitutes an acknowledgment that that property had been duly divided, and the Appellant is estopped by it from alleging that she has not received her share; moreover her claim, being grounded on the deed of July, 1860, is a mere suit upon contract, or for breach of contract, and could not, under the *Limitation Act*, be brought after the lapse of three, or at the utmost of six, years.

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Feb. 3.

Their Lordships reserved their judgment, which was now delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

This is a suit brought by *Rani Mewa Kuwar*, the granddaughter of Rajah *Ruttun Singh*, against *Rani Hulas Kuwar*, the widow of *Khyratee Lall*, who was a grandson of the Rajah, to recover an $8\frac{1}{2}$ annas share of three houses and an imambara situate in the City of *Lucknow*. The Appellant claims $4\frac{1}{4}$ annas in her own right, and $4\frac{1}{4}$ as the representative of her deceased sister, *Chattur Kuwar*.

The claim arises in this way:—The property in dispute, which is in *Oudh*, belonged, with other considerable property in *Rohilcund*, to Rajah *Ruttun Singh*, who died in 1851. It is said that he became a Mahomedan, and that, according to Hindu Law, his ancestral property thereupon vested in his son, *Dowlut Singh*, the father of the Appellant and her sister. *Dowlut Singh* died before his father, and in consequence of his having so pre-deceased him, and having no male issue, the property of the Rajah *Ruttun Singh* would have descended to the grandson, *Khyratee Lall*, whose widow, *Hulas*

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Kuwar, is the Defendant and present Respondent, unless the conversion of the Rajah and the consequent vesting of the estate in *Dowlut Singh* was established. The Defendant raised a further question, namely, that the property of Rajah *Ruttun Singh* had been confiscated by the King of *Oudh*, and had, after the Rajah's death, been granted by the King as an act of grace to his widow, *Rani Raj Kuwar*, and that on her death it descended to *Khyratee Lall* as her legal heir. It appears that questions arising out of this alleged conversion to Mahomedanism of the Rajah, and respecting the confiscation, were contested between the widows of the deceased *Ruttun Singh* and of his son, *Dowlut Singh*; and after their deaths the controversies were renewed between *Khyratee Lall* and the Respondent and her sister. After these controversies, and avowedly to put an end to the disputes, a compromise was effected between the parties, the terms of which are found in what is described as a deed of agreement of the 21st July, 1860. It is essential to the determination of the questions in this appeal to consider what is the effect of this agreement and of a subsequent one which was entered into at a later period of the same year, namely, on the 12th of November.

The first agreement is made between the contending parties, *Khyratee Lall*, and his cousins, *Rani Chattur Kuwar* and the present Appellant, *Rani Mewa Kuwar*, the daughters of *Dowlut Singh*. It is this: "We," describing the parties, "do hereby declare that, regarding the dispute which existed for all the houses, lands, and property left by *Rajah Ruttun Singh*, deceased, whether moveable or immoveable, ancestral, or self acquired, in the custody of the Court of Wards, situated in the district of *Bareilly*, *Pilibhit*, *Shahjehanpore*, *Badaon*, &c., and in the province of *Oudh*, we have, whilst in the perfect enjoyment of our senses, and without being under any kind of compulsion or coercion, come to amicable terms in the presence of Mr. *John Inglis*, Collector of *Bareilly*, and agreed to regard the whole property as if it were one rupee, and to divide it into the following shares: 7½ annas as the share of *Khyratee Lall*, 4¼ annas as the share of *Rani Chattur Kuwar*, and 4¼ annas as the share of *Rani Mewa Kuwar*." That is an agreement that the whole property left by the Rajah *Ruttun Singh*, as well that in *Rohilcund* as that in the province of *Oudh*, shall be divided in those shares

Then comes a provision for a division of the property, according to those shares, by a partition by metes and bounds. That part of the agreement is this: "According to these rates the whole of the property shall be divided amongst the above, agreeably to a punchait to be convened for the purpose. That we shall not retract from this proposed division;" and then declaring that it should be a final agreement between them. It is undisputed that this agreement relates to the whole of the property of Rajah *Ruttun Singh*, as well that in *Oudh* as in *Rohilcund*. In fact that is the case on the part of the Respondent as well as that on the part of the Appellant. Both agree that this agreement was intended to settle the disputes relating to the whole of the property left by the Rajah. Now there is no evidence to be found in the record of an actual partition of the property, either in *Rohilcund* or in *Oudh*, pursuant to the terms of this agreement; but it is said on the part of the Respondent, the Defendant, that by the subsequent agreement, to which I have alluded, of the 12th November, 1860, there is an acknowledgment on the part of the present Appellant and her sister whom she represents, that a partition had taken place of the whole property, as well the property in *Oudh* as in *Rohilcund*, an acknowledgment which binds them by way of estoppel; and that, under those circumstances, the present claim of the Appellant to a share of the houses in *Lucknow* must be defeated. This document is in ambiguous language, and some care is required in considering what is the effect of the language used in it. It may here be said that those who rely upon the document as an estoppel,—the nature of an estoppel being to exclude an inquiry by evidence into the truth,—must clearly establish that it does amount to that which they assert. Now the document is this: "We *Khyratee Lall* in person," and the Appellant and her sister by their attorneys,—"the principals, being heirs of Rajah *Ruttun Singh*, deceased, do hereby declare that: Whereas our case regarding rendition of accounts and division of the property left by Rajah *Ruttun Singh*, now in charge of the Court of Wards, was pending before *Moulvi Mahomed Khyrooddeen*,"—and other persons, naming them, and describing them "as members," and their Lordships understand that they were a committee of persons, or a punchait, appointed to make a partition. The document

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goes on, "the same has now been amicably adjusted and divided amongst ourselves, according to our specific shares,"—that is, the shares mentioned in the first agreement,—"under the auspices of Mr. *John Inglis*, Collector of *Bareilly*, and the division, under the blessings of Providence, having been made accordingly regarding the whole property, viz., cash, furniture, villages, (mortgaged and free from mortgage), houses and shops, cash deposited in banks and treasury, other property moveable of every description, and books, we have received our respective shares. Now there is not the slightest dispute amongst us left unadjusted and unsettled, and there is not a fraction of such property which has not been divided amongst us. We have therefore filed this razeenamah acknowledging division of property and settlement of accounts in the Court of the above-mentioned deputy collector that it may prove of use hereafter." There are undoubtedly words in this agreement which, taken by themselves, are sufficient to comprehend the whole of the property which was the subject of the first agreement; but the words which occur in the commencement of the agreement appear to their Lordships to be the governing words of the instrument, as far as the property included in it is concerned, and those words are: "Whereas our case regarding rendition of accounts and division of the property left by Rajah *Ruttun Singh, now in charge of the Court of Wards.*" Now the only property which could have been in charge of the Court of Wards was the property in *Rohilcund.* Notwithstanding therefore the large words to which I have referred, viz., "Now there is not the slightest dispute amongst us left unadjusted and unsettled, and there is not a fraction of *such* property which has not been divided amongst us," their Lordships think that the reference made in that wide clause by the words "such property" limits its application to the property described in the commencement of the agreement, namely, the property "now in charge of the Court of Wards." Undoubtedly there is some room for the contention that the words "now in charge of the Court of Wards" were not intended to limit the agreement to property which was really in the Court of Wards, but were inserted by mistake and by misapprehension of the parties who might have thought that the property in *Oudh* was in charge of the Court of Wards of the district of *Bareilly.* Their Lordships do not fail to

notice that property was described as being in the custody of the Court of Wards in the first agreement, but there the description is not confined to property in the Court of Wards, but the words "and in the province of *Oudh*" are inserted, apparently for the purpose of shewing that the agreement was intended to comprehend lands in that province as well as those in *Rohilcund*. There are no such words in the agreement of November, and upon the whole their Lordships think that that agreement may properly be confined to the lands in *Rohilcund* which were really in charge of the Court of Wards.

It will be observed from what has been already said that their Lordships have felt that this document is ambiguous, and this being so, the construction of it may be aided by looking at the surrounding circumstances. If it had appeared that the Appellant had had possession for a long number of years of some property which had belonged to Rajah *Ruttun Singh* in *Oudh*, and the Respondent and those she represents had been in possession of other property which had belonged to the Rajah, it might have been inferred that a partition had been made by agreement, and that the parties were content to hold what they had so agreed to take without any formal partition by a punchait. But upon looking at the circumstances which were relied upon by the Respondent's counsel, Mr. *Cave*, to support that presumption, it appears to their Lordships that they fail to do so. The first circumstance relied on was that in addition to the four houses which are the present subjects of dispute, there was a fifth house which, it was said, had belonged to Rajah *Ruttun Singh*, and had been in the possession of the Appellant and her sister and her sister's husband. But the evidence when examined really fails to make out that that house was a part of the property of Rajah *Ruttun Singh*. On the contrary, there is a great deal of evidence to shew that it was the separately acquired property of *Dowlut Singh*, the father of the Appellant, and was no part of the estate of the Rajah. The title to that house is, at least, left in doubt, and it was for the Respondent, if she relied upon the circumstance of the Appellant's having the ownership and possession of the house as presumptive proof of the partition, to have shewn clearly that it formed part of the property of the Rajah.

The other circumstance strongly relied on was that there had

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been an acquiescence of nine years, from the date of the agreement in 1860 to the commencement of this suit, in the possession of the four houses now claimed remaining with the Respondent. But, again, upon investigation their Lordships think that there was no acquiescence from which they could safely presume there had been a partition. It seems that upon the death of the Appellant's sister, *Rani Chattur Kuwar*, the Appellant brought a suit against her husband, *Oudh Beharee Lall*, to recover from him her sister's 4¼ share in the houses now in dispute. That suit was commenced apparently in the year 1866. The defence to it was that *Beharee Lall* was entitled to the property in another right,—it is not necessary to say what right he set up. The present Appellant succeeded in that suit in the lower Court, and also upon appeal in the High Court of the North-west Provinces. Now in that suit she claimed, as against her deceased sister's husband, her sister's share in this very property. It seems incredible if she was aware she and her sister had no right to this property, and that it had gone under a partition to *Khyratee Lall*, that she should have instituted that which would have been, so far as regards this property, an entirely useless suit. It is perfectly true that nothing which occurred in the progress of that suit can be evidence against the present Respondent, who was no party to it; but the suit is so far material and relevant that the present Appellant, having obtained a decree against the sister's husband, *Oudh Beharee Lall*, endeavoured to execute that decree by obtaining possession in due course of law of the houses, and was resisted by the present Respondent, who was then in possession of them. These facts seem to negative anything like acquiescence on the part of the Appellant in a supposed partition by which these houses were allotted and assigned to be held in severalty by the Respondent or by *Khyratee Lall*, whom she represents.

Under these circumstances the case simply comes to the question of the right of the Appellant under the agreement of July, 1860. That agreement assumes that the parties were severally claiming, by virtue of some right of inheritance, the property of the Rajah *Ruttun Singh;* that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle these rights, and they do settle them by arriving at this agreement, which provides that the

property shall be held in certain shares, and shall be divided according to those shares. A partition according to those shares has never taken place, and the Respondent is in possession of the entirety of the houses in *Oudh* and the imambara. Unless therefore the title of the present Appellant is barred by limitation she has, in their Lordships' opinion, a right to a decree for the shares of those houses assigned to her and her sister whom she now represents by the agreement.

Their Lordships in coming to this conclusion have arrived at an opinion in accordance with that of the Judicial Commissioner from where this appeal comes to Her Majesty. The Judicial Commissioner states that he has no doubt that the agreement of November, 1860, did not include the property in *Oudh*. He says, "I shall have to refer again to the agreement effected by the disputants in July, 1860. I deem it necessary to record my concurrence in the ruling of my predecessor in regard to the deed of November, 1860. It is clear from the terms of that document that it referred solely to that portion of the property of the late Rajah *Ruttun Singh* that was situated within the jurisdiction of the collector of *Bareilly*. It sets forth that 'Whereas our case regarding rendition of accounts and division of the property left by Rajah *Ruttun Singh*, now in charge of the Court of Wards, was pending before certain arbitrators, an amicable adjustment has been made and the whole property divided.' The property situated in the province of *Oudh* and claimed in the present suit was not under the charge of the Court of Wards of the *Bareilly* District, and could not therefore have been included in the division referred to in this document." So far, therefore, their Lordships entirely agree with the judgment of the Judicial Commissioner. The way the case came before him ultimately was this,—the Civil Judge of *Lucknow* having at first decided, contrary to the above view of the Judicial Commissioner, that the agreement of November, 1860, did include the *Oudh* property, and was an estoppel, was overruled by a former Judicial Commissioner, Sir *George Cowper*, who remanded the case for an inquiry as to the possession of the houses. The Civil Judge on this remand seems to have thought he must inquire who had had possession during the last twelve years, and finding that the Respondent and her predeces-

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sors had been in possession for more than twelve years, he held that the suit was barred by the *Statute of Limitations*.

The Judicial Commissioner, when the case came before him on final appeal, held that the claim of the Appellant was based on the agreement of July, 1860, and that limitation only ran from that date; but he thought the limitation of six years was applicable to the suit. The judgment of the Judicial Commissioner was that the case of the Appellant rested upon the agreement of July, 1860, and that so resting upon a contract the case was within the 10th clause of sect. 1 of Act XIV. of 1859, and barred by it, inasmuch as the action was not brought within six years from the date of that agreement. Now their Lordships are of opinion that the 10th is not the clause which is applicable to the present claim, but that the suit is really brought for the recovery of immoveable property, and that the clause which properly applies to it is clause 12 of sect. 1. The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the Appellant to prove her title, and not all her case. It therefore seems to their Lordships that the suit is not founded on contract or for a breach of it, but that it is a suit for the recovery of immoveable property "to which no other provision of the Act applies," and so within clause 12; consequently, in their opinion, the proper limitation of the suit is twelve years, and it has not been contended at the Bar that if that be the period of limitation the present suit is barred.

For these reasons their Lordships, agreeing in the view of the merits of the case taken by the Judicial Commissioner, but differing from him as to the effect of the *Statute of Limitations*, must humbly advise Her Majesty that his judgment ought to be reversed, and that a decree ought to be made that the Appellant is entitled to the possession of the 8½ annas share of the properties in *Oudh*, the subject in dispute in the suit. The Appellant to have the costs in *India*, and of this appeal.

Solicitor for the Appellant: *T. L. Wilson.*
Solicitors for the Respondent: *Watkins & Lattey.*

MOHUMMUD BUHADOOR KHAN AND MOHUMMUD ALLY BUHADOOR KHAN . } APPELLANTS;

AND

THE COLLECTOR OF BAREILLY (ON THE PART OF GOVERNMENT), AND OTHERS . . } RESPONDENTS.

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Feb. 26, 27.

On Appeal from the High Court of Judicature, North-Western Provinces, Agra.

A. died the ostensible owner of certain lands, leaving two sons under age. Upon *A's.* death, *B.*, alleging that he was himself the real owner of the lands, caused himself to be recorded as owner in the collector's books, and took possession. Some years later, *B.* was convicted and executed as a rebel, and all the property in his possession confiscated, including the land so taken by him.

The sons of *A.* sued for the recovery of the lands of which they had been dispossessed by *B.*

The suit was brought more than a year after the younger Plaintiff came of age, and more than a year after the passing of Act IX. of 1859, which allows (s. 20) only one year to sue, and does not save the rights of persons under disability:—

Held, that the enactment applies to all Courts, and that the claim was barred by limitation.

THIS appeal was submitted to the Judicial Committee in the form of a Special Case drawn up for the decision of their Lordships, under the provisions of the 6th regulation of the Order in Council, dated the 13th of June, 1853. The special case was to the following effect:—

The Appellants sued the Respondents to recover certain landed property which was, in May, 1858, confiscated by Government as being the property of *Khan Buhadoor Khan*, a rebel, and which had been subsequently granted or sold by Government to the Defendants (other than the Collector of *Bareilly*).

The Appellants claimed the property as having in fact belonged to their father, *Mohummud Tuffuzool Hossein Khan*, who died on the 22nd of April, 1854.

* *Present:*—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

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Mohummud Tuffuzool Hossein Khan left a widow, *Mussumat Bustee Begum*, aged thirty-two years, and two sons, the Appellants, who were then infants.

On *Mohummud Tuffuzool Hossein Khan's* death, his widow, *Bustee Begum*, on the 7th of June, 1854, wrote to the collector of the district the following letter, praying that she and her sons might be recorded in the Government Register as the heirs of the deceased. The revenue authorities, after making local inquiries through a subordinate officer, ordered the name, not of the applicants, but of *Nuwab Khan Buhadoor Khan*, the grandfather of the deceased, to be entered upon the Government Register as the proprietor.

Khan Buhadoor Khan remained in possession of the property until May, 1858, when he was convicted and executed as a rebel, and the property was confiscated by Government as belonging to him.

Government, having thus confiscated the property, sold or granted various portions of it to the several Respondents.

In 1861 the elder Appellant came of age, and in 1864 the younger came of age.

On the 1st of May, 1865, the Appellants filed their petition in *formâ pauperis*, in the nature of a plaint, against the several Respondents, asking for cancelment of the auction sales and for possession of the property, with wasilat (mesne profits) from the date of the institution of the suit.

The collector and some of the other Respondents in their written statements pleaded Act IX. of 1859 in bar of the suit.

On the 1st of August, 1866, the Judge settled the issues as follows:—

"1. Whether was the suit absolutely barred as against any and every party by the lapse of one year from the date of confiscation or attachment?

"2. Limitation, how does it run? Whether was it obligatory on the minor or minors to sue within one year of obtaining his or their majority?

"3. Is the suit of either one of the Plaintiffs, or both of them, barred by limitation, or is it not?"

The Judge who tried the case, on the 1st of August, 1866, gave

his decision on the first issue to the effect that *Mohummud Tuffuzool Hossein Khan* had a *primâ facie* title, and that *Khan Buhadoor Khan* was to be regarded as a trustee for the minors, so that his possession was not adverse to them; that the collector, under the Court of Wards, ought to have taken charge of their interests, and ought to have sued in their behalf within a year after the confiscation of the property. The Judge, therefore, declared that under Issue I. the suit was not necessarily barred by limitation, but might in so far be heard on its merits.

The Judge did not then give any decision on the second and third of the issues, and, before proceeding to decide on them, settled issues of fact for trial as to the proprietary rights of the father of the Appellants as opposed to those of the rebel, and on the 14th of November, 1866, gave his judgment.

On the facts the Judge found that a real title to the property had been conveyed to the Appellant's father, and, on his death, to his legal heirs, the Appellants and their mother.

The Judge then proceeded as follows:—

"This Court further declares that, according to English law, this would be trust property, but that it hesitates to declare that the collector of 1854 was *ex-officio* trustee; as regards the share in the hereditary estate of *Tuffuzool Hossein Khan*, it no doubt was illegally attached.

"A provincial Court can add no word to the letter of the special law IX. of 1859, nor draw any inference or put any construction other than the most literal on that law.

"The opening words (1) of the section 20 guarantee that parties not guilty of rebellion shall not lose their properties. These Plaintiffs are not accused of rebellion, and they were infants. They may not have been legally capable of rebellion. They legally could not appear as parties to any suit before the Special Commission. *Bustee Begum* was not a legal guardian by any law, English or Mahomedan, and she was the more silent because of the terror caused by the execution of *Khan Buhadoor Khan*, and

(1) "Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which, upon conviction, the property of the offender is forfeited in respect of any property attached, or seized as forfeited, or liable to be forfeited to Government."

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if there was any party who might have appeared it was the collector. Trust property cannot be escheated by the English law, for it is especially protected from forfeiture, and from the silence of this law IX. of 1859 as regards minors and trust property, construed in juxtaposition with the opening words guaranteeing properties to those who were not rebels, it, in the opinion of this Court, was an act bad in law, and null and void, to attach and confiscate the properties of minors, such properties never having been attached or confiscated. It being an illegal act, and as if not done, the special words (1) taken from sect. 11, Act XIV. of 1859, do not bar this suit. But in the opinion of this Court the words quoted (2), taken from the same section, must be literally accepted in bar of it.

"The advocate of Plaintiffs has pleaded general limitation of twelve years, and quotes three precedents (3) in support.

"This Court concurs generally that it is a singular fact that *Bustee Begum* (but that she is especially barred), being an adult before 1854, had a right of action of twelve years from 1854, and that her infant sons had no right of action of twelve years running from 1854. Yet these are the written words of the law, plain and indisputable; nor can a Provincial Court put any but a literal construction on those words, even when otherwise concurring with Plaintiffs' advocate on the point of tenderness shewn by the law to infants.

"The argument of Defendant that these words apply to the later cause of action do not meet the question, for a faulty title is not made a good title by any such subsequent alienation as is pleaded, unless stamped by limitation."

The Judge, then, after giving his reasons for holding that

(1) "If at the time when the right to bring an action first accrues the person to whom the right accrues is under a legal disability, the action may be brought by such person, or his representative, within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued."

(2) "Unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased."

(3) "No. 3 of 1865, d/- 4th Jany., 1866, Wyman's Reporter, p. 56; No. 3487 of 1865, d/- 21st April, 1866; No. 84 of 1866, d/- 16th June, 1866, Wyman's Reporter, p. 288, and volume ii., p. 27."

eighteen was the legal age of majority of the Plaintiff, and not sixteen as pleaded by the Defendants (a plea not set up in the special case), declared that either and both the Plaintiffs had a right in equity; that the elder Plaintiff was barred by law; that the younger Plaintiff was not barred; and the Court decreed the claim of the younger Plaintiff, less the share of *Bustee Begum*, the mother, with costs in proportion.

The Appellants appealed to the High Court of the North-Western Provinces, and some of the Respondents, including the collector, presented cross appeals. In the collector's memorandum of cross appeal it was submitted that, under the regulations, even if the Appellant's father had been entitled, the estate could not have been taken possession of by the Court of Wards, and that the suit was barred by sect. 20, Act IX. of 1859.

The High Court (Sir *W. Morgan*, Chief Justice, and Mr. Justice *Roberts*), did not enter into the facts of the case, but confined their decision solely to the question whether the Appellants' claim was barred by limitation.

The decision of the High Court stated as follows:—

"The Plaintiffs sued to recover the property in question, as property which belonged formerly to their father, *Tuffuzool Hossein Khan*, and after his death to the Plaintiffs. The Court below decided that the suit was barred by limitation as to one of the Plaintiffs, but that the younger Plaintiff, *Mohummud Ally Buhador Khan*, was entitled to a decree.

"In the view which we take of the case it is not necessary that we should consider whether or not the property claimed really belonged to the Plaintiff's father, and on his death descended to the Plaintiffs. It appears certain that at and previous to the time of the conviction of *Khan Buhadoor Khan* it was in his possession and under his control, and that it was seized and confiscated as a portion of his possessions. If so, the Plaintiff's right of suit to recover it is now barred by the operation of sect. 20 of Act IX. of 1859. By that section the rights of persons not charged with the offences therein referred to, in respect of any property seized as forfeited, or liable to be forfeited, are saved. But such saving is subject to the stringent proviso in the latter part of the section, whereby all rights of suit in respect of such property are taken

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away, unless the suit is instituted within one year from the seizure. The law being conceived in general terms, the Courts are not at liberty to introduce into it any exceptions, however just and reasonable they may appear, and however consistent with the principles on which laws of limitation are ordinarily based. The law in question is a special law, and this provision was probably designed to promote the speedy assertion and adjudication of all rights put forward to forfeited property. The exceptions in favour of minority and other legal disability which the general law of limitation of suits (Act XIV. of 1859) contains have no place in this Act, and cannot be introduced by the tribunals, which are bound to give full effect to the law. Upon this principle the Plaintiffs, notwithstanding that they were minors at the time of the seizure, can claim no exemption from the operation of sect. 20; and, assuming the property sued for to have really belonged to them, yet, as it was seized as a part of the confiscated property of *Khan Buhadoor Khan*, they can now maintain no suit for its recovery, more than one year having elapsed from the time of seizure. The Appeals Nos. 16, 21, and 25 are decreed, and No. 9 is dismissed, but without costs."

Mr. *Bell*, and Mr. *Doyne*, for the Appellants:—

Here the property was confiscated, as being that of *Nuwab Buhadoor Khan*, while, in fact, it belongs to *Mohummud Tuffuzool Hossein Khan's* heirs, who were minors; and on those heirs suing to recover the property, the Government pleads that they are barred because they did not sue within one year from the date of the confiscation, and denies that they are entitled to any additional time as having been under disability.

We admit that eighteen is the age of majority, and that upwards of a year intervened between the attainment of majority by the younger brother and the institution of the suit. We admit also that the Indian Courts have held (1) that no suit can be brought in the ordinary Courts except within a year; but those decisions proceed upon too narrow an interpretation of the Act. The limi-

(1) *Gopind Pandy* v. *Heemutt Bahadoor*, 6 Suth. W. R. 43; *Nepal Singh* v. *Ram Sunen Singh*, 1 Suth. W. R. extra vol. 1864, p. 5; *Nundeen Singh* v. *Mussumat Bibee Koolsoom*, Ibid. 377.

tation could only apply to some right, title, and interest of the rebel himself.

The cases of *Mussumat Thukrain* v. *Government* (1), and *Rajah Saligram* v. *Secretary of State for India* (2), shew that confiscation of rebels' property does not extend to the confiscation of property of which a rebel is only the trustee, and *Khan Buhadoor Khan* is to be regarded as a trustee for the heirs of *Tuffuzool Hossein Khan*.

The general law saves the right of parties under disability, and there cannot have been any intention to do away with the general law. The saving clauses of Act XIV. of 1859 apply. The prohibition to entertain a suit unless it be instituted within a year from the date of seizure is introduced merely by way of proviso. The intention was to limit the right to sue in the special Court set up by this Act, but not to interfere with the general law of limitation in suits before the regular tribunals, where any one had been unjustly deprived of his property. Act IX. of 1859 has been repealed by Act VIII. of 1868, except as to certain clauses. Extreme hardship would arise if the Act were held to be retrospective in its operation; and this affords ground for thinking that it cannot have been intended to have a retrospective effect.

Act IX. of 1859 came into operation on the 30th of April in that year. The confiscation took place in May, 1858; and, in fact, upon the interpretation now set up, we should only have had one month to sue in, and that at a time when a suit was really impossible even with the utmost diligence. If sect. 20 is retrospective no right of suit is given, however great the injustice may have been. The ordinary period of limitation in such a case was twelve years. Is the Act by implication and retrospection to deprive parties of all right of appeal to the ordinary courts?

Mr. *Forsyth*, Q.C., and Mr. *M. Chalmers*, for the Respondents, were not called upon.

The decision of their Lordships was pronounced by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

The only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought

(1) 14 Moore's Ind. App. 112. (2) 2nd Aug., 1872. 18 Suth. W. R. 389.

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by the Appellants against the Collector of *Bareilly* and the purchasers from the Government, to recover certain landed property in *Bareilly*, is barred by limitation. The Appellants claim the property as the heirs of their father, *Mohummud Tuffuzool Hossein Khan*, who died on the 22nd of April, in the year 1854. The special case states that it is to be assumed for the purposes of the case that the father of the Appellants was on his death entitled to the property sued for. That statement is made only for the purpose of raising the question which is for their Lordships' consideration on the Statutes of Limitation. It appears, however, upon the special case, that before and at the time of the death of *Mohummud Tuffuzool Hossein Khan*, one *Khan Buhadoor Khan* was in the actual possession of the property. That person became a rebel, and in May, 1858, his property was seized by the Government as forfeited on the ground of his rebellion. At the time of their father's death, and of the forfeiture of the property, the Appellants were minors. The elder Appellant became of age in 1861, and the younger in February, 1864. The present suit was brought on the 1st of May, 1865, and at that time the elder Appellant had been, as appears from these dates, of age for four years, and the younger Appellant for upwards of a year.

The Act of Limitation which is relied on by the Government is Act IX. of 1859. That Act was passed for the special purpose of providing a Court for the adjudication of claims by innocent persons upon the property of rebels which had been forfeited to the Government. It established a special Court, consisting of three Commissioners, and suspended the action of all other Courts in respect of such claims. Special modes of proceeding are established, and various clauses in the Act relate to that special course of procedure. But there are provisions in the Act which relate not merely to the Court so established and the procedure under it, but are of a general character, and apply to the property forfeited in whatever Court the claims may be made regarding it. One of those clauses is clause 16, which provides, "Whenever any person shall have been convicted of an offence for which his property was forfeited to Government, no Court has power in any suit or proceeding relating to such property to question the validity of the conviction." Sects. 17 and 18 are also clauses of a general nature,

and so it appears to their Lordships is clause 20, which contains the limitation on which the Government rely. The clause is this: "Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which upon conviction the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."

It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is Act VIII. of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general clauses to which I have referred, including clause 20, are saved from the operation of the repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that these clauses were at that time considered by the Legislature to be of a general nature, affecting claims to property which had been forfeited before whatever Court those claims might be prosecuted.

The words are perfectly plain,—no suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment; and that, although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any persons in respect of forfeited property.

Assuming then that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only

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to apply to some right, title, and interest—using the words of the ordinary execution Acts—of the rebel himself. Now it is obvious that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited, and it is only in respect of claims other than his that this limitation could operate. The Act is declared not to affect the rights of parties in respect of the property seized. "The property" is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of the rebel, in that property.

Another contention, which seems to have been the only one urged in the High Court, as far as it appears from the judgment, is, that a saving with respect to parties under disabilities must be taken to be by equitable construction implied in this clause. Their Lordships however think it is impossible that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended, they are found in the Acts containing the limitation, as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

It was said that the clauses in the general statute, Act XIV., 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV. is a code of limitation of general application. This Act is of a special kind and does not admit of those enactments being annexed to it. It is to be observed that if it could be done it would not assist the Appellants, because the limitation of Act IX. is one year only, and the saving in favour of minors in sect. 11 of Act XIV. would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit.

One other objection requires to be noticed, that this Act was not retrospective. Undoubtedly Mr. *Doyne* was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of

this Act, or even where the year might have elapsed between the date of the confiscation and the passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it.

Mr. *Forsyth*:—One of the questions is: "Whether, if it shall be decided that the Appellants or either of them is barred by limitation, the Government Respondent shall have any and what costs of this special case."

After a discusssion on this question,—

SIR MONTAGUE E. SMITH said, According to the course of their Lordships' decisions the Government are entitled to the costs. Whether they will think that under the circumstances they should enforce payment of them from the Respondent is for their consideration.

Solicitor for the Appellants: *W. D. Oehme.*
Solicitors for the Respondents: *Lawford & Waterhouse.*

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BRINDABUN CHUNDER SIRCAR CHOWDHRY, AND SRISH CHUNDER SIRCAR CHOWDHRY . . . . . } APPELLANTS;

AND

BRINDABUN CHUNDER DEY CHOWDHRY, AND OTHERS . . . . . } RESPONDENTS.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

Under the description "putnee talook" and "durputnee talook," it must be *primâ facie* intended that the tenure called a putnee tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale free from incumbrances. According to the effect of Act X. of 1859, s. 105, Reg. VIII. of 1819, ss. 8 and 11, and probably also of Reg. I. of 1820, the effect of the sale of such a talook for arrears of rent is to destroy all incumbrances which have been created by the putneedar, *e. g.* a durputnee tenure.

THE principal question in this appeal was whether the purchaser of a putnee tenure at a sale for arrears of rent due to the zemindar, can disturb the possession of the holder of the sub-tenure, called a durputnee, where it does not appear in evidence that the documents interchanged at the creation of the putnee expressly reserved the right of selling or bringing to sale for an arrear of rent.

The facts were shortly as follows:—

One *Rutnessur Roy* held a putnee of mouzah *Jeebunnugger* from the zemindars of the talook wherein that village was situated, and he was registered as such putneedar.

Neither the putnee lease nor any copy of it appeared in the record.

In 1820 *Rutnessur* as putneedar, for a cash payment, granted to *Ram Mohun Dey Chowdhry* (now represented by the Respondents)

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

a durputnee of the mouzah at an annual rent a little above the amount of the rent which he paid for the putnee lease.

In the durputnee was the following clause:—"If you neglect or default to pay the entire amount of rent by the end of the year, then, after the expiration of one month of the following year, I shall of my own authority take possession of the said mehal, against which you shall have no complaint."

In the year 1861 the zemindars of the village (now the Appellants) instituted a suit for rent in arrear against the *Dey Chowdhrys* (the Respondents), as being in possession on behalf of *Rutnessur Roy*, under circumstances into which it is not necessary to enter.

The Respondents set up as defences that the Appellants were not really the zemindars, but that even if so the Respondents were durputneedars under *Rutnessur Roy*, and that the action ought to have been against him or his representatives.

On the 6th of December, 1861, the collector dismissed the suit, on the ground that the Defendants were durputneedars, and that the action should have been against the putneedar *Rutnessur Roy's* heirs.

The Appellants then brought an action (No. 343 of 1862, under Act X. of 1859) in the Collector's Court against the heirs of *Rutnessur Roy* for the putnee rents, and no defence having been taken, they, on the 30th of April, 1862, recovered judgment for the balance of Rs.5,156 1*a*. 3*p*. and costs, being rent for over eleven years, after giving credit for sums received.

The heirs of *Rutnessur Roy* then brought a suit (No. 558 of 1862, under Act X.) against the Respondents, and thereupon a petition was put in by the maharajah of *Kishnaghur*, in which he disputed the right of *Rutnessur Roy* or his heirs to the putnee, alleged that it was held benamee for himself (the maharajah), and alleged that the suit against *Rutnessur's* heirs was a fraud upon the maharajah's rights.

The Respondents supported the position so taken on behalf of the maharajah, and the collector, on the 5th of September, 1862, considering that the Plaintiffs (the heirs of *Rutnessur Roy*) had not made out that they had any beneficial interest in the property, dismissed the suit with costs.

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The collector had on the Act X. decree obtained by the Appellants in suit No. 343 of 1862, against *Rutnessur Roy's* heirs, in the first instance directed the putnee to be sold; but apparently upon the intervention of the maharajah, that direction was varied, and the Appellants were referred to a regular suit to enforce their decree.

They thereupon instituted a regular suit, No. 6 of 1864, against the maharajah and the heirs of *Rutneesur Roy*, to establish the Appellant's claim to sell the putnee under the decree; and in this suit the Principal Sudder Ameen, on the 3rd of March, 1864, decided that the Appellants were entitled to sue the putneedar whose name was registered; and he ordered the mehal to be sold for the arrears of rent and the maharajah to pay the costs of suit. The Respondents were not parties to the suit.

In pursuance of such decree, and to carry out the decree of Act X. Case No. 343 of 1862, an execution proceeding, No. 51, was commenced, the Appellants being the Plaintiffs and the heirs of *Rutnessur Roy* being the Defendants; and the decreed property was on the 11th of August, 1864, in conformity with the provisions of Reg. I. of 1820, and Act VIII. of 1835 (1), put up for sale by the collector, and sold to the Appellants themselves through their mooktear, he being on their behalf the highest bidder. The Appellants were afterwards put in possession by legal process.

In 1865 the Respondents brought the present action against the Appellants, the heirs of *Rutnessur Roy*, and the maharajah.

The plaint sought "possession and mesne profits of a durputnee mehal by a declaration of title."

It alleged collusion between the Appellants and the *Roys*, whereby, concealing the fact of the maharajah being the real putneedar, they had obtained a decree for rent against the *Roys*, under which the putnee was sold and the Appellants put in possession.

The principal question in the suit turned, as above stated, on the interpretation of certain portions of the Revenue Regulations. The most material of these are the following:—

Bengal Reg. VIII. of 1819. Preamble: "There has been created

(1) This latter Act merely provides that such sales shall be carried into effect by the collector.

a tenure, . . . the character of which tenure is, that it is a talook created by the zemindar, to be held at a rent fixed in perpetuity by the lessee and his heirs for ever; the tenant is called upon to furnish collateral security for the rent, and for his conduct generally, or he is excused from this obligation at the zemindar's discretion; but even if the original tenant be excused, still in case of sale for arrears or other operation leading to the introduction of another tenant, such new incumbent has always in practice been liable to be so-called upon at the option of the zemindar: by the terms also of the engagements interchanged, it is amongst other stipulations provided, that in case of an arrear occurring, the tenure may be brought to sale by the zemindar, and if the sale do not yield a sufficient amount to make good the balance of the rent at the time due, the remaining property of the defaulter shall be further answerable for the demand. These tenures have usually been denominated putnee talooks, and it has been a common practice of the holders of them to underlet on precisely similar terms to other persons, who, on taking such leases, went by the name of durputnee talookdars; these again sometimes similarly underlet to seputneedars, and the conditions of all the title-deeds vary in nothing material from the original engagements executed by the first holder."

Sect. 3, cl. 2: "Putnee talookdars are hereby declared to possess the right of letting out the lands composing their talooks in any manner they may deem most conducive to their interest, and any engagements so entered into by such talookdars with others shall be legal and binding between the parties to the same, their heirs and assignees; provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrance resulting from the act of his tenant."

Sect. 8, cl. 1: "Zemindars, that is proprietors under direct engagements with the government, shall be entitled to apply in the manner following, for periodical sales of any tenures upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. The exercise

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of this power shall not be confined to cases in which the stipulation for sale may have been unrestricted in regard to time, but shall equally apply to tenures held under engagements stipulating merely for a sale at the end of the year, in conformity with the practice heretofore allowed by the regulations in force."

Sect. 11, cl. 1: "It is hereby declared that any talook or saleable tenure that may be disposed of at a public sale under the rules of this regulation for arrears of rent due on account of it, is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held. No transfer by sale, gift, or otherwise, no mortgage or other limited assignment shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable, in the state in which he created it, for the rent, which is, in fact, his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zemindar."

Sect. 11, cl. 2: "In like manner, on sale of a talook for arrears, all leases originating with the holder of a former tenure, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land and to collect the rents of the ryots, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent."

Act. X. of 1859, sect. 105: "If the decree be for an arrear of rent due in respect of an under tenure, which, by the title deeds or the custom of the country, is transferable by sale, the judgment creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force."

The Principal Sudder Ameen dismissed the suit of the Respondents.

From this decree the Respondents appealed to the High Court.

On the 7th of December, 1867, a division bench of that Court allowed the appeal and reversed the decree of the Principal Sudder Ameen. The decision of Mr. Justice *Phear* was expressed in the following terms:—

"The substantial question in this case is, whether or not, on the sale of the putnee by the zemindar for arrears of rent, the putnee tenure passed into the hands of the purchaser free of the incumbrance upon it, which, in the shape of a durputnee tenure, had existed up to the time of the sale.

"It is admitted that the putnee tenure was, either by the title deeds or by the custom of the country, transferable by sale, and the sale in question was effected in execution of a decree for arrears of rent, which the zemindar had obtained in the Collector's Court, an application and order for that purpose having been made in pursuance of the provisions in that behalf of sect. 105, Act. X. of 1859. The sale was, therefore, legally good and valid. What then passed by it?

"The words of sect. 105, Act X. of 1859, do not expressly say whether only the rights and interests of the judgment debtor in the tenure are to pass, or whether, on the other hand, the purchaser is to get the tenure free of all burdens. If the section had been entirely silent on the point, the first of these alternatives would, of course, have been presumed. But this is not strictly the case; the section refers in certain terms to the rules 'for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force,' and in the case of *Mahabooddin* v. *Futteh Ally* (1), a full bench of this Court has decided that this reference in effect incorporates into Act X. the provisions of the then existing law with regard to the sale of tenures for arrears of rent.

"From this decision, it follows, that in the case of the sale of a tenure for arrears of rent effected under sect. 105 of Act X. of 1859, the tenure will pass free of incumbrances, or not, according as the same result would have followed if the same tenure had

(1) Sutherland's 7 Weekly Reporter, 260.

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been sold for arrears of rent under the provisions in that behalf of any law which was in force at the time of the passing of Act X.

"Now at that time the sale of a tenure could only be free of incumbrances if it took place in accordance with the provisions of Regulation VIII. of 1819. Sect. 8 of that regulation, as is observed in the judgment of the full bench, points out the conditions under which a tenure may be brought to sale within the terms of the regulation, and clause 1 of sect. 11 of the same regulation, declares that all such sales (subject to certain exceptions) should be free of incumbrances. Now the material condition precedent to a sale being made within the regulation, as given in sect. 8, is, that 'the right of selling or bringing to sale for an arrear of rent, may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.' If this stipulation did not exist, the sale would not carry with it to the purchaser the benefit of the regulation. It is essential then, to the Defendant's case, that this stipulation should have been made in the engagements interchanged at the creation of this putnee; unless this was so, the title to the durputnee which the Plaintiff has made out, gives him the right to succeed in this suit. But there is no evidence whatever on the record to suggest that such a stipulation was made at the creation of the putnee; therefore, I think the lower Court has committed an error in dismissing the Plaintiff's suit.

"The Defendants argued before us that the sales referred to by sect. 11 of Regulation VIII. of 1819, were not limited by the words of sect. 8, but certainly included all the sales for arrears of rent of that peculiar tenure which is denominated putnee, and in support of this position they relied on clause 2 of sect. 3 of the same regulation. This runs as follows:—

"'2nd. Putnee talookdars are hereby declared to possess the right of letting out the lands composing their talooks in any manner they may deem most conducive to their interest, and any engagements so entered into by such talookdars with others shall be legal and binding between the parties to the same, their heirs and assignees; provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state

in which he granted it, and free of all incumbrance resulting from the act of his tenant.'

"But in truth the term putnee, as used in the regulation, contains in itself the very limitation in question. For the preamble of this regulation, when describing the origin and character of the tenure 'usually denominated a putnee talook,' and stating the reasons which rendered it necessary to regulate and define the nature of the property given and acquired 'on the creation of such a tenure,' expressly stated that by the terms of the engagements interchanged at that time it is amongst other stipulations provided that in case of an arrear occurring the 'tenure may be brought to sale by the zemindar.' Consequently, as it appears to me, this argument fails to help the Defendants.

"In my opinion the decree of the Court below ought to be reversed, and the Plaintiff's claim decreed with costs."

Mr. Justice *Bayley*, the other Judge who heard the case, added the following remarks:—"I concur in this order, and in the view that the material point is in this case, that it should be shewn that there was the stipulation for the agreement between the parties for sale in the event of arrears. No such stipulation has been shewn. Thus there is an error in the Lower Appellate Court's holding that Plaintiff's suit should be decreed."

From this judgment the appeal was preferred.

The appeal now came on to be heard.

Mr. *Cowie*, Q.C., and Mr. *J. D. Bell*, for the Appellants:—

The Legislature says that what are known as putnee talooks shall be saleable for arrears, in exercise of the right of the zemindar, free from incumbrances, and we contend that in this case the durputnee tenure was annulled by the sale of the putnee. It may be said that by the judgment of the Judicial Committee in 14 Moore's Ind. App. Ca. p. 112 (1) recognising a decision of a full bench of the High Court at Calcutta (2), we are precluded from this contention. But in the case before the High Court, the original grant was made by an ijaradar, not a zemindar, and

(1) *Forbes* v. *Lutchmeeput Singh*; S. C. 17 Suth W. R. 19.

(2) *Shahaboodeen* v. *Futteh Ali*, 7 Suth W. R. 260.

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therefore was not a putnee, and its terms were not known to the Court; but the Court decided that where a tenure is not expressly made saleable for arrears of rent by the documents by which it was created, it cannot be sold free from incumbrances.

In the case in 14 Moore's Ind. App. Ca. p. 112, the sunnuds by which the tenure was created were found not to contain a power of sale, and it appeared that the tenure had been mortgaged, and the mortgagee had foreclosed, and had obtained symbolical possession by legal process, and had made such overtures for the payment of rent to the superior as dispensed (in the opinion of the Judicial Committee) with the necessity for any further tender. Notwithstanding which, the superior obtained a decree for arrears of rent by default in a suit against the heirs of the mortgagor, who wrongfully kept possession, and he sold the tenure for a grossly inadequate price. It was held that the sale was invalid, and the doctrine laid down by the High Court in the case cited, that in the absence of express stipulation the zemindar had no right to sell, was fully recognised. But those decisions were not pronounced in the case of putnee talooks, and they are not inconsistent with our position that by the sale of a putnee talook for arrears, all incumbrances are annulled, for although the terms of the putnee grant have not been ascertained, it is of the very nature of a putnee talook to be saleable for arrears, and it must be presumed that it is made liable to sale by the instrument of its creation, and consequently that it is saleable, free from incumbrances, under sect. 8, Regulation VIII. of 1819. This clause, together with sect. XI. of the same regulation, clearly annuls the durputnee, and Act X. of 1859, sect. 105, by reference, incorporates the old law with itself. The zemindar, by sect. 111, clause 3, of Act VIII. of 1819, can bring the putnee itself to sale, not merely the right, title, and interest of the putneedar, though the latter is to be entitled to any excess in the proceeds of such sale beyond the amount of the rent due. Act VIII. of 1819, sect. 3, clause 2, enables putnee talookdars to let out the lands composing their talooks, and to enter into binding engagements, "provided that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free

from all incumbrances resulting from the act of his tenant." Here "the right of the zemindar" is spoken of as a right already existing. We admit that if the zemindar had given the putneedar a power to create a durputnee tenure, he could not afterwards sell the putnee for rent, except subject to the durputnee; but such a power is exceptional, and he who claims it must prove that it exists.

Mr. *Doyne*, for the Respondents:—

It is not be taken without proof that the putnee tenure was liable by virtue of the pottah to be sold for arrears of rent. The Appellant who has purchased the putnee is himself the zemindar, and therefore ought to have the kobala which was given by the grantee of the putnee tenure, and which would of course shew whether the putnee pottah contained a stipulation that the tenure should be saleable for arrears. The definition of putnee tenure which has been referred to occurs merely in the preamble, and not in the enacting part of Regulation VIII. of 1819, and was intended only to explain why the Legislature was induced to sanction a class of tenures which it had previously forbidden; it was not intended to limit the right of contract, but merely to sanction what it could not prevent, and to provide for the rights of all parties, the subject being one which much needed to be regulated. It is fair to look to the terms of the durputnee pottah, as shewing what were probably the contents of the original putnee pottah. In it there is no stipulation that the tenure shall be saleable for arrears. The preamble never intended to say that there was one undeviating form which is always to be presumed where the original is not produced. *Wilson*, Gloss., 410, inclines to the opinion that the word commonly written "putnee," bears relation to potta, a lease; which would favour the view that these modern tenures always originate in written instruments, and therefore the instrument should be produced. Regulation VIII., of 1819, is very strong against the lessee, but it provides for the observance of certain forms by the zemindar, and it did not intend to allow him to avoid all sub-tenures unless where that power had been expressly stipulated for. Regulation VIII., of 1819, was intended to put putnee talooks on the same footing as other talooks, and to give the

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zemindar the like remedies for his rent. The old Regulations speak of talooks as leases. "Talook" means a dependency, and the term "talook" was used at a time when it had no legal validity. An independent talookdar pays rent to the state, a dependent talookdar pays to the zemindar: 3 *Harington's* Analysis, 247. All the provisions of the regulations were intended to help the zemindar to recover his rent, in order that he might pay the Government. It may be fairly doubted whether the Legislature intended the zemindar to sell for eleven years' arrears of rent, or whether he was limited to his yearly kist. The Regulation of 1799 makes no difference between putnee and other tolooks; all talooks are there regarded as hereditary. In a recent case in the Privy Council it appeared that a putnee lease had been granted in which no words of inheritance were employed.

[SIR BARNES PEACOCK:—The word "putnee" implies inheritance, just as a grant "in fee" is sufficient without "heirs."]

Mr. *Cowie*, Q.C., in reply.

The proceedings in the Courts in India were also commented on at considerable length by the counsel on both sides with reference to the allegation of the Respondents that the decree under which the putnee tenure was sold had been obtained by collusion between the maharajah and the heirs of *Rutnessur Roy*.

Their Lordships' judgment was pronounced by

THE RIGHT HON. SIR BARNES PEACOCK:—

This is a suit for possession and mesne profits of a durputnee mehal brought against the zemindar. The charge is that the zemindar in collusion with the heirs of *Rutnessur Roy*, who was said to be merely a benamee holder of the putnee talook, obtained a decree against them for Rs.5,156 as arrears of rent of the said putnee, and that under that decree he sold the putnee, and having purchased it in his own name entered upon the estate of the durputneedar, treating the durputnee as having ceased to exist upon the sale of the putnee.

With regard to the fraud their Lordships are of opinion that there is no sufficient evidence to satisfy a Court of justice that there was

any fraud or collusion between the zemindar and the heirs of *Rutnessur*, to allow the zemindar to obtain a decree against *Rutnessur* for arrears of rent which were not actually due. A strong fact against the supposition of fraud was this, that the zemindar originally sued the durputneedars for these arrears of rent. The durputneedars in that suit set up as a defence that *Rutnessur* was the putneedar and that they were merely the durputneedars of the mouzah, hence they said, the Plaintiffs' claim can be made against *Rutnessur* and his heirs, and not against us. Now if the durputneedars at that time thought that the action ought to have been brought against the Maharajah of *Kishnaghur*, for whom they said *Rutnessur* held the estate benamee, why did they not say so in their defence? They said, *Rutnessur* is the person liable for these arrears and you must sue him. Upon that the case went to trial in the Collector's Court; and the Judge who tried the case held that *Rutnessur* was the putneedar, and therefore that the Plaintiffs could not sue the durputneedars, and he dismissed the suit with costs, whereupon the zemindar brought an action against the heirs of *Rutnessur* for the arrears of rent, and it is that suit which is now charged as having been brought by collusion between the zemindar and *Rutnessur* for the purpose of injuring the durputneedars by fraudulently obtaining a decree for rent which was not due, and then selling the putnee and avoiding the incumbrance of the durputnee.

There being, then, no fraud in the case, the question arises, whether, upon the sale of the putnee, under the decree for rent, it was sold free from the incumbrances which had been created by the putneedar, or, in other words, whether it was sold free from the durputnee. That depends upon the construction of sect. 105 of Act X. of 1859. That section enacts "If the decree be for an arrear of rent due in respect of an under tenure which by the title deeds or the custom of the country is transferable by sale, the judgment creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree, according to the rules for the sale of under tenures for the recovery of arrears of rent due in respect thereof, contained in any law for the time being in force." It has been held, upon the construction of those words, "according to the rules for the sale of

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under tenures," that the effect of Regulation VIII. of 1819, and I. of 1820, is applicable to cases of sales under decrees of rent made under this sect. 105; and then the question arises whether this was a sale for an arrear of rent due in respect of an under tenure which by the title deeds or the custom of the country is transferable by sale.

The Plaintiff in his plaint describes the tenure as a putnee talook, and his own tenure as a durputnee, and the point is, whether, under the description of "putnee and durputnee;" it is to be presumed that the putnee tenure was one such as is described as the tenure denominated a putnee by Regulation VIII. of 1819. In the preamble of that regulation—which, as contended for by the learned counsel, it must be admitted is not an enactment but merely a recital, it is said, "By the terms of the engagements interchanged it is, amongst other stipulations, provided, that in case of an arrear occurring, the tenure may be brought to sale by the zemindar, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be answerable for the demand. These tenures have usually been denominated putnee talooks."

Their Lordships are of opinion that under the description "putnee talook" and "durputnee talook" it must be *primâ facie* intended that the tenure called a putnee tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that in case of an arrear occurring, the estate might be brought to sale. If so according to the terms of Regulation VIII. of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances. By sect. 8 of Regulation VIII. it is enacted, "Proprietors under direct engagements with the Government shall be entitled to apply in the manner following for periodical sales of any tenures upon which the right of selling or bringing to sale" —not the right of selling or bringing to sale free from incumbrances but—"upon which the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." Then, by sect. 11, the effect of such a sale is stated as follows: "It is hereby declared that any talook or saleable tenure that may

be disposed of at a public sale under the rules of this Regulation for arrears of rent due on account of it, is sold free from all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by a stipulation to that effect in the written engagements under which the said talook may have been held."

It appears therefore to their Lordships that this was the sale of a talook transferable by sale, and upon which the right to sell arrears of rent was reserved in the engagements entered into by the parties. Consequently, according to the effect of sect. 105 of Act X. of 1859 and sects. 8 and 11 of Regulation VIII. of 1819, and probably also of Regulation I. of 1820, the effect of the sale of the putnee talook was to destroy all incumbrances which had been created by the putneedar, and consequently to destroy the particular incumbrance which is mentioned in the plaint in this suit, namely, the durputnee of the Plaintiff.

Their Lordships, therefore, think that the suit was not maintainable, and that the learned Judges of the High Court did not probably give sufficient effect to the recital of the preamble of Regulation VIII. of 1819 and the enactments of that regulation, in holding that it did not appear that the putnee was a tenure upon which the right to sell for arrears of rents had been reserved by the contract of the parties.

Under these circumstances it appears to their Lordships that the decision of the High Court was not correct, and they will therefore humbly recommend Her Majesty to reverse that decision and to affirm the decision of the Principal Sudder Ameen, with the costs of this appeal.

Solicitors for the Appellants: *Barrow & Barton.*
Solicitors for the Respondents: *Lawford & Waterhouse.*

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TACOORDEEN TEWARRY . . . . . APPELLANT;

AND

NAWAB SYED ALI HOSSEIN KHAN AND OTHERS . . . . . RESPONDENTS.

EX PARTE.

On Appeal from the High Court of Judicature at Fort William, in Bengal.

Where a purdanusheen lady, living apart from her relations and natural advisers, makes a deed in favour of a person who has on some occasions acted as her man of business, the strongest proof ought to be given by him that the transaction was a real and *bonâ fide* one, and was fully understood by the lady whose property is dealt with.

In a suit for setting aside deeds some evidence ought to be given by the Plaintiff in order to impeach such deeds; and he is not entitled, merely on proof of heirship, to throw on the Defendant the burden of shewing a better title..

Where a suit is brought for confirmation of possession and the setting aside of deeds by a person alleging himself to be in possession and to be heir, and he proves his heirship and that the deeds ought to be set aside, but fails to prove possession; the decree cannot be for confirmation of possession, but it should direct the deeds to be set aside, and should not be limited to a declaration of the Plaintiff's title as heir.

THE Respondents were the brother and sister of one *Mussumat Koodrutoonissa*, who was possessed of the property in dispute, which comprised a share in certain mouzahs and villages.

Koodrutoonissa appears to have been on bad terms with the Respondents, who were her heirs, and for some years prior to her death she had ceased to reside with them, and had gone to live in the city of *Patna*.

Koodrutoonissa died in the year 1864, and on the 23rd of April, 1866, the Respondents filed their plaint in the Court of the principal Sudder Ameen of *Zillah Gya* against the Appellant, and against one *Mookoondee Lall*, dated the 11th of July, 1861, and thereby

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT. HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

claimed a confirmation of their alleged possession of the mouzahs therein described and specified, and also the reversal, of a certain summary proceeding of the 3rd of February, 1866, and the setting aside of a deed of sale dated the 23rd of July, 1861, and a mooktearnamah of the 11th of July of the same year, which two last-mentioned documents they alleged to be fraudulent and fabricated.

The deed of sale purported to convey to the Appellant the whole interest of *Koodrutoonissa* in the property in dispute, in consideration of the sum of Rs.39,500. The mooktearnamah purported to appoint *Mookoondee Lall* the agent of *Koodrutoonissa* for the purpose of executing the deed of sale, which was executed by him, but which also bore the signature of *Koodrutoonissa*. The summary proceeding referred to was a judicial order whereby the claim of a judgment creditor of *Koodrutoonissa*, seeking execution of his decree against the property in dispute as being her property, was refused on the objection of the Appellant as intervenor, on the ground that the property had been conveyed to the Appellant by the said deed of sale.

The plaint alleged that *Koodrutoonissa* had never executed the deed of sale or the mooktearnamah; that she had remained in possession of the property in question until her death, and had been succeeded therein by the Respondents, who were alleged to be then in possession (under a certificate which they had obtained under Act XXVII. of 1860) of all the moveable and immoveable property of the deceased.

The Appellant, by his Written Statement, insisted that the Plaintiffs were not in possession, and therefore could not sue for the confirmation of their possession; that the summary order of the 3rd of February, 1866, was conclusive and binding on the Plaintiffs; that the Defendant was in possession under the deed of sale of the 23rd of July, 1861; that that deed was proved to be valid by the admissions of *Koodrutoonissa* herself, and by other evidence; that the certificate of administration of the estate of *Koodrutoonissa* was no proof of the Plaintiffs' possession of the property in dispute; and that the right of the Defendant to such property had already been established by judicial decision.

The chief allegations of the Respondents, in a Written State-

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ment which they filed, apparently by way of replication, were:—That at the time of the execution of the deed of sale *Koodrutoonissa* was lying ill and insensible in the Defendant's house; that she was not in debt; that a claim mentioned in the deed as due by *Koodrutoonissa*, and as making the sale necessary, was less than the sum stated in the deed, and had been discharged before the date of the deed of sale; that the Plaintiffs were in possession of the property in dispute; that *Koodrutoonissa*, before the date of the deed of sale of 1861, had lost her old seal, and had substituted another for it, and that the deed of sale was not sealed with the substituted seal; that *Koodrutoonissa* lived and died in the Defendant's house; that the sale was improbable and unreasonable; that the Defendant was not possessed of means to make such a purchase.

The principal issues framed in the cause were as follows:—

Did *Mussumat Koodrutoonissa Begum*, the Plaintiffs' ancestor, really execute the power of attorney for effecting the sale in favour of *Mookoondee Lall*, dated the 11th of July, 1861, or not? And did the said mooktear, acting under that power, execute a deed of sale in favour of *Tacoordeen Tewarry*, Defendant, after receipt of consideration, or not?

Are the Plaintiffs, or is the Defendant *Tacoordeen Tewarry*, in possession of the disputed property? If the Defendant be in possession, can a suit lie for confirmation of possession?

The nature and scope of the evidence adduced on each side will sufficiently appear from the judgments.

The cause came on to be heard before the Principal Sudder Ameen, who pronounced the deed of sale to be false and fraudulent, holding that *Koodrutoonissa Begum* continued in possession of the property during her life, and that the Respondents, and not the Appellant, got possession after her death.

He therefore decreed that the Plaintiff's possession should be confirmed in the property in dispute, and that the deed of sale and the power to execute the deed, alleged by the Appellant, and dated respectively, the 23rd of July, 1861, and the 11th of July in the same year, and the summary proceedings of the 3rd of February, 1866, should be set aside with costs. From this decision the Appellant appealed to the High Court.

The appeal was heard by Mr. *Seton-Karr* and *Dwarkanauth Mitter*, two of the Judges of that Court, who pronounced their decision on the 13th of August, 1867.

The judgment contains the following passages :—

"The pleaders for the Appellant have raised the two following points for our decision :—

"1st.—That the Plaintiffs, Respondents, have utterly failed to prove their alleged possession ; and their suit, being for confirmation of possession, ought therefore to be dismissed.

"2nd.—That the Appellant has satisfactorily proved his plea of purchase, and the genuineness of the mooktearnamah and bill of sale relied upon by him in support thereof.

"With reference to the first point we observe, that whilst we so far agree with the Appellant, that the Respondents have failed to prove their allegation of possession, we cannot, upon that ground, dismiss the whole suit. We are unable to accept the finding of the Court below, that the Respondents have succeeded in shewing that they were in possession of the property in suit, at any time previous to the institution of this action. We have carefully gone through the evidence produced by them to establish this point, and are clearly of opinion that this evidence is wholly insufficient to give any satisfaction to our minds. We cannot believe that, if the Respondents were in posssession at any time since the death of their ancestor, *Koodrutoonissa Begum*, they could have possibly failed to produce documentary evidence to prove this possession, when the Appellant has been distinctly challenging them to do so. The property in suit is considerable and large ; upon the Respondents own shewing it extends over 200 villages.

"If they were really in possession of these villages for the period of two years that has elapsed from the date of *Koodrutoonissa's* death to that of the present suit, their means of proving such possession must have been abundant. Not a single pattah, kablihat, jumma wasil-bakee, or other collection paper, has been produced ; and, if the allegation of the Respondents had any foundation in truth, masses of such evidence, which is the invariable concomitant of actual possession in this country, would have been forthcoming. But be this as it may, the fact of their having failed to produce a single ryot, tehsildar, or putwary, or even a neighbour, to prove

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this important point in their case, is a difficulty which we think it nearly impossible for them to get over. They have produced a number of witnesses it is true; but, even if the testimony of these witnesses were not open to other objections of a grave character, we do not think that it can supply the defects pointed out above .... Our finding, therefore, is, that the Respondents have utterly failed to prove their alleged possession, and that, therefore, they are not entitled to a decree for confirmation of possession. But because we are unable to give them the 'consequential relief' they have prayed for, we do not see any substantial reason why we should not make a binding declaration of right between them and the Appellant in this very case. It has been contended that we have no power to make such a declaration in the present suit; but we cannot accept this contention as correct. Sect. 15 of the *Procedure Code*, which is set out *in extenso* (1), expressly gives us such power. The case before us falls within the express wording of the second part of this section. The Plaintiffs, Respondents, had asked for the confirmation of their possession in the property under litigation. This relief we have seen we are not in a position to give to them; but the law gives us full power to make a binding declaration of title between the parties to the suit; and we fail to perceive any reason why we should not exercise this power in this case, if we think that justice requires it. The words '*without* granting consequential relief' clearly indicate that the Civil Courts can grant the one sort of relief, though they might not be able to grant the other. The law leaves it in the discretion of the Court it is true; but we are clearly of opinion that this is one of the fittest cases in which such discretion ought to be exercised. It is admitted that the Respondents are the heirs-at-law to to the deceased *Koodrutoonissa Begum*. If the deeds propounded by the Appellant are not good and valid deeds, as contended for by the Respondents, the latter are the undoubted owners of the property in suit. An issue regarding the genuineness and validity of these deeds has been already joined and decided between the

(1) "No suit shall be open to objection on the ground that a *merely* declaratory decree or order is sought thereby, and it *shall be lawful* for the Civil Courts to make *binding* declarations of right *without* granting consequential relief." Act. VIII. of 1859, s. 15.

parties in the Court below; and no satisfactory reasons have been shewn to us to justify our interference with the exercise of a discretion which the law has clearly vested in that Court. It is true that the Respondents have failed to prove one of the material averments in their plaint; but this can hardly be taken to be an all-sufficient reason for depriving them of the entire relief they have obtained from the Court below, because we find that they are not entitled to a part of it. . . . .

"With regard to the second point raised before us in this appeal, we are clearly of opinion that the Court below has come to a right conclusion. We are unable to concur with the Lower Court in thinking that the Respondents have given any evidence on this point upon which we can safely rely. The allegations made by them in their written statements, that *Koodrutoonissa* was in a state of insensibility at the time of the alleged execution of the documents in question, that she had lost her old seal and prepared a new one, and various others of a similar description, are not supported by one tittle of reliable evidence.

"But the rejection of the evidence produced by the Respondents, cannot in any matter rectify the utter failure of proof on the part of the Appellant upon the question now in controversy before us. We cannot agree with the pleaders of the Appellant in holding that the *onus* of proof, with regard to this question, lies upon the Respondents. *Koodrutoonissa* was the undisputed owner of the property in suit, and, as we have already observed, the Respondents have a *primâ facie* title to the same, which it is incumbent upon the Appellant to rebut by proving a better one. Which party would lose if no evidence were given on either side? Unquestionably the Appellant. The case would have been different, if this were a criminal prosecution for forgery; but, in a civil suit like the present, each party is bound to prove the title upon which he relies. The Appellant is bound to make out a *primâ facie* case with reference to his asserted title by purchase, and, until he has succeeded in doing so, the fact of his opponent's failure to produce any reliable counter-evidence, would only justify the conclusion we have already arrived at, that the present is one of those unfortunate cases in which false evidence has been foolishly resorted to for the purpose of strengthening a good cause. In disposing of

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this issue, however, we shall make use of such facts only as are either admitted or undisputed by the Appellant himself. It is admitted that the alleged vendor of the Appellant was a purdanusheen native lady of rank and wealth. The property in suit, upon the Appellant's own shewing, is worth Rs.39,500 or Rs.40,000 nearly in round numbers. Even if we believe the witnesses produced by the Appellants, that she was not so strict in her adherence to the purdah custom as ladies of her rank and position in life usually are, we have still the right to demand from the Appellant a tolerable amount of satisfactory evidence to prove that the deed relied upon by him really emanated from her. It is also admitted that she had left her family house at *Hossenabad*, and was residing at the time of the alleged execution of the deeds in question in the city of *Patna*, apart from her friends and relatives. The Respondents have been throughout contending that she was living in the house of the Appellant, and under his control and influence. The Appellant has strenuously repudiated this assertion; but as he has failed to give us any information about the house in which she was actually living, and the relation in which he stood towards her, previous to the date of this transaction, we might fairly assume that she was living in an unknown house, and that the Appellant dealt with her precisely in the same way as a stranger would have done under ordinary circumstances. It is also admitted that about this time a litigation was going on between her and the Respondents, who are her own brother and sister, regarding her title to the very property which the latter are now claiming, after her death, as her heirs-at-law. No information has been given to us by the Appellant, or by his witnesses, as to the party who was conducting this litigation on her behalf, nor has it been, in any manner, suggested to us that she had any relative, friend, or confidential adviser living with her permanently or otherwise, in order to look after affairs in Court or out of Court. Under such circumstances the ends of justice imperatively require that a party pleading a purchase from her of property which is admittedly of such considerable value, should prove it by the most cogent and trustworthy evidence. Let us now examine the evidence produced by the Appellant to prove his case. . . . .

"It is waste of time to comment upon such witnesses, and we,

therefore, do not feel the slightest hesitation in rejecting their evidence as utterly unworthy of credit.

"We wish to say a word about the consideration money before we go to the documentary evidence that has been so strongly pressed upon us by the pleaders for the Appellant. The Respondents have been throughout challenging the capacity of the Appellant to raise such a large sum of money as Rs.40,000. We have not got a shred of evidence to satisfy us, in any manner, that the Appellant was really capable of raising such a large amount. The deeds recite that the consideration money was actually paid on the dates thereof, whereas the witnesses of the Appellant try to prove that it was not paid until after the registration of the conveyance, when the money was brought in an unknown number of bags by the servants of the Appellant from his own house to that of the alleged vendor. Not one of these servants has been produced as a witness; and if we reject the evidence of those who have been called to prove this fact, we have not the slightest reason to believe that these bags were anything but imaginary ones. . . . .

"As to the documentary evidence, it consists of the following exhibits:—

"1. A petition, dated the 8th of January, 1862, filed by the Respondents in reply to another filed by the Appellant of a previous date.

"2. A petition alleged to have been filed by *Kudrutoonissa Begum*, dated the 21st of May, 1863.

"3. Another petition also alleged to have filed by her, dated the 23rd of January, 1862.

"4. A written statement alleged to have been filed by the lady, dated the 24th of April, 1863.

"5. A few decrees under Act X of 1859, obtained by the Appellant during the lifetime of the lady.

"Much stress has been laid before us on the first mentioned document. The following were the circumstances under which the Respondents had filed it in Court. A suit was going on between the Respondents and their ancestor, *Koodrutoonissa Begum*, for the very property now under litigation. Whilst the Respondents were disputing the lady's title in this suit, the Appellant came forward as an intervener, and asked the Court to substitute his name in the

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place of the lady's, upon the strength of the instruments he has now propounded before us. The Respondents filed the petition in answer to the Appellant's prayer for substitution. They attacked the title of *Koodrutoonissa*, and asserted their own; and in one part of this petition they remarked that the conveyance put forward by the Appellant was '*another*' fraud of *Koodrutoonissa*, who, they said, even at that time was living in the house and under the control of the Appellant. It cannot be contended that the Respondents are in any way bound by this so-called admission; and as a mere piece of evidence, what is its value? It might have been the impression then in their minds that the Appellant had used improper influence in making her seal and sign the conveyance, and in inducing her to put it forward in fraud of their own claim; but how does this fact assist the Appellant's case? Even if we had any evidence to satisfy us that the seal and signature were hers, and that *Tacoordeen*, the Appellant, had prevailed over her to put forward a sham conveyance, what effect would it have upon the issue we are determining? What becomes of the reality of the purchase relied upon by the Appellant? And if this reality is not established, what becomes of his title to the property in suit? We are far from saying, however, that there is a single atom of reliable evidence to satisfy us that the mere execution of the deeds even has been duly proved. It may be that the Appellant having the lady under his control got her to sign and seal blank papers without knowing what their contents really were. This is the real contention of the Respondents, however much they might have disfigured it by false assertions and false evidence. But if we reject the case set up by the Respondents, the Appellant is not legally or justly entitled to depart from his own case and fall back at the last moment upon that of his antagonists. It has been said that the Respondents could have easily blown up the scheme of the Appellant by giving timely information to the lady herself, who was then alive. But we are unable to perceive the force of this argument. The Respondents were then fighting with *Koodrutoonissa* herself; it is not suggested that they had any access to her, and if they had, it cannot be said that they were any way interested at that time to give her information about the fraud with which they were charging both her and the Appellant. The

other documents, purporting to contain admissions of the lady herself, are equally worthless, if not more so. No evidence has been given that these admissions had emanated from her. It has been contended that these exhibits being authenticated copies of petitions and written statements, filed in Court, ought to be accepted as good *primâ facie* evidence, which it is for the other party to disprove. We cannot adopt this doctrine as correct. No authority has been shewn to us on this point, but even if there were, we think that the introduction of such a doctrine would be extremely dangerous in this country, particularly in the case of secluded females of rank. In the cause of a secluded female, law-suits are generally conducted by relatives or friends, where there are no relatives duly authorized for the purpose. Whatever petitions and pleadings therefore are filed in their names, must have at least passed through more than one channel. The vakeel acts upon the authority of the mooktear, and the mooktear upon the strength of his mooktearnamah. Who were the mooktears who caused these exhibits to be filed in the name of the deceased lady? Where the genuineness and *bona fides* of such exhibits are disputed by parties competent to do so, the person who relies upon them ought to prove them by evidence. The Appellant has failed to produce any evidence to prove these documents, and we reject them as wholly unproven. We wish to make one remark regarding these so-called admissions. Exhibit No. 4 is a written statement purporting to have been filed by *Koodrutoonissa* in a suit in which she was fighting with one *Jugeeroonissa* [*Syedoonissa*], who was then disputing her title. In this written statement she is made to say in one place, that she had '*bulkay*' (*rather*) sold her property to the Appellant, mentioning him by name. This written statement is verified by one *Rohun Lall*, acting as an authorized agent on her behalf. *Rohun Lall* has been examined as a subscribing witness to the conveyance, and strange to say the Appellant did not ask him a single question about the genuineness of this exhibit, or about *Rohun's* authority to verify it on the lady's behalf. What he has said, however, is quite sufficient to prove that it was the concoction of the Appellant himself, if we believe the testimony of the witness on this point. He has stated that he was the mooktear of the lady before the date of the conveyance,

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and that he has been acting as the mooktear of *Tacoordeen* since that date. We find him even now carrying on five unsuccessful suits for rent in connection with this very property as agent and kurpurdauz of the Appellant. It is unnecessary for us to state anything further regarding the other two exhibits, Nos. 2 and 3, and we therefore dismiss them by remarking that if any of those documents does really contain the genuine seal of *Koodrutoonissa Begum*, the Appellant must have been very unfairly and improperly using that seal to serve his own interested motives.

"The Act X decrees are also of no value. The Appellant has not given any satisfactory evidence to prove that these decrees were obtained in a *bonâ fide* manner. His evidence regarding his possession either during the lifetime of *Koodrutoonissa*, or after her death, is as valueless as his opponents'; and there is nothing to shew that anything was actually done under these decrees beyond certain proceedings in paper. In Special Appeals Nos. 3050, 3051, 3052, 3053, and 3054 of 1866, that have been heard along with this appeal at the special request of the Appellant, we find that both the Lower Courts have found that disputes have been going on between the parties for the collection of rent; and that the Appellant had failed to establish his right to receive it. From whatever point of view we look at the case of the Appellant we find it to be entirely unsupported by any reliable evidence.

"We therefore hold that the decree of the Court below ought to be reversed so far as it declares that the Respondents are entitled to be maintained in the possession of the property in suit, and we confirm it to the extent of declaring that the Respondents are the rightful owners of that property. The costs of the Lower Court will be borne by the parties themselves, but the costs of this appeal must be paid by the Appellant to the Respondents with interest at 12 per cent. per annum."

The appeal now came on to be heard *ex parte*.

Mr. *J. D. Bell*, for the Appellant:—

Both the Indian Courts have decided against the validity of the deed, which the Plaintiffs in this suit (now the Respondents) sought

to set aside; but the findings on fact which formed the basis of the judgment of the Principal Sudder Ameen were not adopted by the High Court, and the decisions of the two Courts do not proceed on the same reasoning. The documentary evidence was not sufficiently noticed by the High Court. The documentary evidence shews that the mooktearnamah empowering *Mookoondee Lall* to execute the deed of sale was not admitted to registration without the precautions which are usual in the case of documents purporting to be executed by females of rank; that the deed of sale was duly registered on its execution in July, 1861; that as early as January, 1862, it was referred to and expressly impugned in the course of certain litigation by the brother and sister of *Kudrutoonissa*, which proves that they were fully acquainted with it; that upon that and several other occasions petitions, in which the sale transactions were set forth and recognised, were presented, and in one instance a written statement in a suit filed by her through her mooktear, whose authority must be presumed to have been proved to the satisfaction of the Court; that the Appellant, in 1863 and 1864, succeeded in enforcing his rights under the deed as landlord in several rent suits, which must have been known to the Respondents as sharers in the same land. Although *Koodrutoonissa* died between October, 1863, and August, 1864, the first attempt of the Respondents to dispute the title of the Appellants was not before the 3rd of December, 1864, when they presented, in a rent suit, a petition which does not appear to have been followed up; and though the Appellant was afterwards successful in other rent suits, the Respondents did not institute the present suit till April, 1866.

By the summary order of the 3rd of February, 1866, the claim of the present Appellant, as intervening under the deed, was given effect to between him and an execution creditor of *Koodrutoonissa*. The signature of *Koodrutoonissa* to the mooktearnamah is unimpeached.

The evidence given to the effect that *Koodrutoonissa* had occasion to borrow money is not rebutted by any evidence to the contrary.

The Respondents' contention was that *Koodrutoonissa* was in a state of incapacity, and that the seal on the deed of sale was not

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the seal which she used at the time of its date. These statements were not proved, and the evidence as to the alleged possession by the Respondents was held by the High Court to be untrustworthy.

The Court ought not to make a declaration where it is unable to grant consequential relief. The judgment of the High Court is wrong in throwing the *onus* of proof on the Appellant simply because the Respondents are the heirs. Heirs who are out of possession must prove the facts upon which they attack the possession of the Defendant. Our evidence in favour of the documents impeached is at least fair *primâ facie* evidence. The Respondents came to claim possession from us, and they have not proved that they are entitled to a decree in their favour.

At the close of the argument their Lordships' judgment was delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH :—

This was a suit brought by the Respondents against the present Appellant, *Tacoordeen Tewarry*, for a confirmation of their possession of certain mouzahs; and their plaint, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a summary proceeding, and, which is the most important part of their prayer, after setting aside a fraudulent and fabricated deed of sale set up by the Appellant. The deed which is sought to be impeached is of the date of the 23rd of July, 1861. The Respondents are the heirs of *Mussumat Koodrutoonissa*, a purdanusheen lady, who some time before her death seems to have had some dispute with her relatives, and went to reside in the town of *Patna*. The Appellant, *Tacoordeen Tewarry*, was living in *Patna;* and in the course of the evidence given in this suit, it was stated by the witnesses on the part of the Plaintiffs, that *Mussumat Koodrutoonissa* went to live in his house, that she died there, and that he had acted on several occasions as her mooktear. The deeds which are impeached are a deed of sale of the mouzahs from the lady to *Tacoordeen Tewarry*, professing to be made in consideration of a sum of Rs.39,501 (a large part of which, namely, Rs.17,960, is stated to have been paid to a creditor

of the lady), and a mooktearnamah for the execution of that deed.

When the case came before the Principal Sudder Ameen, evidence was gone into on both sides; on the part of the Plaintiffs to shew that they were in possession of the property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated, and that there had been no real sale from the lady to the Appellant. The Appellant went into evidence to shew that he had been in possession of the property subsequently to the date of the alleged deed, during the lifetime of the lady, and had continued in possession up to the time of the suit, and also to shew that the deeds were really executed, and that the consideration money had passed. Upon a review of the evidence on both sides, the Principal Sudder Ameen came to the conclusion that the Plaintiffs were in possession of the property, and that the deeds were fabricated; and he made a decree confirming the Plaintiffs in the possession; and directing that the deeds should be set aside. The Appellant appealed to the High Court, and that Court disagreed with the Principal Sudder Ameen as to his finding upon the possession of the property. They thought that upon the whole of the evidence the Respondents had not proved their possession, and in fact, that the possession was with the Appellant. Being of that opinion, they reversed so much of the Principal Sudder Ameen's decree as confirmed the Plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dispute; namely, whether the deeds were genuine deeds or not. In approaching that question they seemed to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaint prayed that the deeds might be set aside, which is a prayer for substantive relief, and the Principal Sudder Ameen was quite right, when he came to the conclusion on the facts that the deeds ought to be set aside, in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the sub-

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stance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal Sudder Ameen; namely, that these deeds had not been executed by the lady.

It was contended by Mr. *Bell*, that the High Court ought not to have thrown the onus of supporting the deeds upon the Appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the Plaintiff, in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an action of ejectment brought by the Appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the Appellant to shew a better title. But although the Judges do not quite correctly state the principle of fixing the *onus*, their judgment is substantially right, because the Plaintiffs did not put their case before the Principal Sudder Ameen simply upon their title as heirs, and throw it upon the Appellant to prove a better title, but they did, by evidence, challenge the validity of the deeds. They called witnesses to shew the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the Appellant accepted the *onus* which that evidence *primâ facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are, that this lady was a purdanusheen, living apart from her relations; whether in the house of the Appellant or not may not be distinctly proved, but certainly in a place where she was without those natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favour of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the

strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one, and fully understood by the lady whose property is dealt with. So far from giving satisfactory evidence on these points, the Appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a mooktear called *Mookoondee Lall*, who had a mooktearnamah from her for that purpose. The mooktearnamah is filed, and appears upon this record; but *Mookoondee Lall*, the mooktear, who is supposed to have executed this deed, is not produced as a witness. Again, the execution of the mooktearnamah is supposed to have been verified by the nazir and three witnesses, the nazir having afterwards reported to the Principal Sudder Ameen, who registered the document. The nazir and those three witnesses have not been called. And, further, the writer of the deed of sale himself, who was present, according to the evidence, at the time when the deed was executed, is also kept out of the witness-box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is not trustworthy evidence of the payment of the purchase-money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the Appellant was attempted to be supported by the evidence of proceedings which had taken place in the lifetime of the lady in rent suits, and in a suit in which there was a contest between the lady and her relatives. Documents in those suits referred to the sale; and authenticity is endeavoured to be given to the transaction in consequence of the lady herself having recognised it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the

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substance of both the decisions below, that these deeds are not genuine, and ought to be set aside.

Their Lordships think that the decree of the Principal Sudder Ameen was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal Sudder Ameen's decree, really vary its terms, by inserting a general declaration that the Plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal Sudder Ameen with regard to the possession—a reversal in which their Lordships concur—and added what follows in their formal decree, "and that so much of the decree of the said Court as declares that the said Plaintiffs are the rightful owners of the said property be confirmed." Their Lordships think that as the plaint had prayed for substantive relief, namely, that the deeds should be set aside, the more correct form of decree is in the terms of that prayer.

Their Lordships will, therefore humbly advise Her Majesty to vary the decree of the High Court by striking out so much thereof as purports to confirm the decree of the Principal Sudder Ameen, and to order that in lieu thereof so much of the last-named decree as ordered the deed of sale and the mooktearnamah to be cancelled and set aside be affirmed.

Solicitors for the Appellant: *Watkins & Lattey.*

RAJAH MUTTU RAMALINGA SETUPATI, ZEMINDAR OF RAMNAD, THE ADOPTED SON OF THE LATE ZEMINDAR RAMASWAMI SETUPATI, AND SURVIVOR OF RANEE SETUPATI PARVATAVARDANI NAUCHEAR, LATE ZEMINDAR OF RAMNAD, CO-PLAINTIFF, DECEASED . . . . . } APPELLANT;

AND

PERIANAYAGUM PILLAI, GUARDIAN OF RAMANADA PANDARAM, A MINOR, HEIR TO AMBALAVANA PILLAI, LATE DEFENDANT, DECEASED . . . . . } RESPONDENT.

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Jan. 16, 17, 23, 24, 28, 29; *March* 18.

On Appeal from the High Court of Judicature at Madras.

The important principle to be observed by the Courts in dealing with the constitution and rules of religious brotherhoods attached to Hindu temples is to ascertain, if possible, the special laws and usages governing the particular community whose affairs have become the subject of litigation, and to be guided by them. The custom and practice in such matters is to be proved by testimony.

A zemindar claiming a customary right to grant confirmation of the election of a mohunt must prove the custom.

An acknowledgment, taken in troubled times from the guardian of an infant mohunt, of a zemindar's customary right to control and remove the mohunt, is entitled to little, if any, weight as evidence of the custom.

The superintending authority over religious endowments exercised by the old rulers of the country passed to the British Government; and Reg. VII. of 1817, of the *Madras Presidency*, merely defined the manner in which that power was thenceforth to be exercised.

Reports made by collectors, acting under Reg. VII. of 1817, of the *Madras Presidency*, are not to be regarded as having judicial authority where they express opinions on the private rights of parties; but being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded on them.

THE zemindars of *Ramnad*, in the district of *Madras*, represent one of the principal benefactors of the richly-endowed pagoda of

* *Present*:—THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, and THE RIGHT HON. SIR ROBERT P. COLLIER.

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Rameswarem, and the zemindar for the time being enjoys the title of Setupati, or Lord of the Causeway by which pilgrims approach the temple. He also claims the title of Dharmakarta (which he interprets as meaning trustee or superintendent of the affairs of the pagoda), and the right to appoint and to grant investiture to the pandaram, or chief priest of the temple.

In the year 1857 the zemindar, the late *Ranee Setupati Parvatavardani Nauchear*, filed her plaint in the Civil Court of *Madura* against the pandaram, *Ambalavana Pillai*, stating the gifts and claims of the family in respect of the pagoda, and alleging that the Defendant had not been duly appointed; that he had not managed the affairs of the pagoda under the superintendence of the zemindar, notwithstanding that in 1837 the person who was then the pandaram had entered into a special convention to do so. The plaint also charged the pandaram with misapplication of funds, and prayed that he might be removed from the management and might pay over a balance of Rs.18,000 to the Plaintiff.

The Defendant by his answer insisted that the pagoda owed the chief part of its wealth to other sources than the endowments derived from the zemindar; that the pandaram and not the zemindar was the dharmakarta, and that he had a right to appoint his own successor; that the instrument of 1837 set up by the Plaintiff was fabricated, and, at all events, invalid. He pleaded also the *Statute of Limitations*.

(It may be here mentioned that while the suit was pending the Plaintiff adopted a son, the Appellant, who was associated with her as co-Plaintiff, and also survived her. The original Defendant died, and was succeeded by the Respondent.)

The parties went into evidence, and certain depositions or statements made in 1815 or 1816 (the admissibility of which was disputed) were tendered to prove that several appointments and removals of pandarams had been made previous to 1793 by *Muttu Ramalinga*, the zemindar of the day, a rajah in whose time the country was in a disturbed state, and who was finally deposed by the British Government. It was clearly established that in 1793 he appointed a boy of the sacerdotal family of *Tillianayagam Pillai* to be pandaram, and took from the boy, through his guardian, a kararnamah, or engagement, in the following terms:—

"To *M. R. Ry. Karttakkal Avergal.*

"Kararnamah executed by *Ramanadan*, son of *Tillianayagam Pillai*, on the 25th Ady, in the year Pramadicha (11th August, 1793).

"As you have been pleased to appoint me for the management of the affairs of the pagoda at *Rameswarem*, I will cause puja to be duly performed in the pagoda six times a day without delay, and get the monthly, annual, and other festivals affairs duly performed as usual; I shall have the fixed wages of the servants and workmen of the pagoda paid to them without any difference, and make every one of the servants to attend to his duty regularly. If any one is absent I shall mark down his name in the absent book, and make a stoppage in his wages, and credit the same to the pagoda. I shall keep peace with the ryots in the villages attached to the pagoda, so as to effect proper cultivation, and use all the means I could to enhance the amount of profit. If any one in the pagoda, or any of the ryots in the villages, shall be found guilty, or if any case be brought by them, I shall stand impartial in deciding the case, and levy fine from the person found guilty, and carry the money to the credit of the pagoda.

"I shall deal in peace with those who are friendly with *Samastanam* (*Zemindary*), and stand against those who are adversaries. In case of my dealing friendly with the enemies of the zemindary you may remove me and appoint another person in my room. I shall pay into the palace half of the profits realised in hundies on account of the puja of the goddess *Raja Rajeswara Ammann*. As a person belonging to the zemindary, I shall take every care to see the affairs of the pagoda performed efficiently. If I act improperly in these affairs I shall submit myself to the orders of the zemindar.

"Thus do I execute this kararnamah of my free will.

(Signed) "*Ramanadan.*"

This kararnamah was witnessed by *Arunachalam* and *Yeganayagam*, officers of the pagoda.

About the same time the zemindar issued a written order to all the officers of the pagoda, enjoining them to obey the new pandaram.

In 1803 the government revenue in respect of the zemindary

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was permanently settled with the zemindar. The settlement did not comprise any of the villages belonging to the pagoda.

In the year 1815, the pandaram, who was appointed in 1793, died, and one *Venkatachellum* claimed to succeed him, whereupon the zemindar, alleging that *Venkatachellum* had been unduly appointed by certain persons who had misappropriated and intended to misappropriate the property of the pagoda, applied to the collector to issue directions that the said *Venkatachellum* should not be acknowledged as pandaram, and that the property of the deceased pandaram should be placed in charge in charge of the Circar (Government).

The collector issued an order, restraining *Venkatachellum* from acting as pandaram "until further orders," but on the 23rd of July, 1816, after further investigation, he issued another order, directing that *Venkatachellum* should be acknowledged as pandaram of the pagoda, with all the usual honours and offerings. It appears however, that he was not allowed exclusive control over the property and finances of the pagoda, but that he was ordered to conduct its affairs jointly with the Circar servants, and subject to the control of the sub-collector. At this time the pagoda was under attachment by the collector, with the sanction of the Board of Revenue, and the zemindary was also under attachment, because the succession to it was disputed; but it was matter of contest in the cause at what dates they had severally been attached, or whether they had been attached together.

In the year 1828, the litigation respecting the succession to the zemindary terminated by the judgment of His Majesty in Council, dated the 28th of April, 1828, in favour of *Ramaswami Setupati*, who thereupon became Zemindar of *Ramnad*.

In the year 1829, the attachment was accordingly removed, and the zemindary and its appendages formally handed over to *Ramaswami Setupati*, in the following manner:—

On the 30th of April, 1829, the collector informed the zemindar, *Ramaswami Setupati*, that he had issued a circular order to all the amildars of the thirteen talooks of the zemindary, the tahsildars of the pagoda and choultry, and the other servants, directing them to act up to the zemindar's orders from the 1st of May.

The zemindar was accordingly put in possession of the zemin-

dary, together with all the pagodas (including the pagoda in question), and gave his formal receipt for the same, on the 14th of May, 1829, in the following terms:

"As *Henry Morris*, Esq., the sub-collector of *Madura*, has put in my possession the Zemindary of *Ramnad*, and all the pagodas, choultries, &c., as also the accounts of the zemindary, and all the utensils, cloths, cattles, dhonies, &c., of the pagodas and choultries, this is to be held as the whole receipt for the same."

Venkatachellum presented a petition to the collector, Mr. *Vivash*, praying that the pagoda and its appurtenances might be placed in his possession as pandaram according to usage, whereupon the zemindar set up a claim to the dharmakartaship or management of the pagoda, denying the claim of the pandaram.

The pandaram also petitioned the authorities at *Madras* on the subject, by whom the matter was referred to Mr. *Vivash* to report upon; and his report, dated the 20th of September, 1832, was as follows:—

"To the President and Members of the Board of Revenue, *Fort St. George.*

"Gentlemen,—

"1. With reference to the enclosed correspondence, I have the honour to report on the claim of [the pandaram of] *Rameswarem*, to the management of the *Rameswarem Devastanum*, and the villages and revenues with which that establishment is endowed.

"2. The devastanum and chuttrums of *Rameswarem* were assumed by Mr. *Peter*, with the sanction of your Board, in consequence of mismanagement by the pandaram, and entrusted to the superintendence of the head tahsildar of *Ramnad*, and subsequently to the control of the sub-collector, who continued to manage the devastanum affairs until the *Ramnad* zemindary was made over to *Ramaswami Setupati*, the zemindar, in the year 1829. The *Rameswarem Devastanum* was entrusted to the zemindar's management at the same time, as a temporary measure, in consequence of the sub-collector having been appointed to another part of the district, and the zemindar was the only responsible person to whom I could with propriety and safety entrust the

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management pending the determination of your Board as to provisions for the future devastanum management.

"3. The late pandaram, of whose conduct Mr. *Peter* complained, died in the year 1815, and the present claimant appears by an order of Mr. *Peter* to the head tahsildar, to have been nominated as his successor, although he was not allowed, as his predecessor, exclusive control, he was ordered jointly with the Circar servants, to conduct the devastanum affairs. He now claims exclusive management.

"4. The *Ramnad* zemindar, or, rather the manager in the zemindar's behalf, urges his right to management of the devastanum affairs on the ground that the late pandaram executed a deed to the former kurthakul, agreeing to abide by his control; it appears to me to be unnecessary to dwell upon this claim, as the *Rameswarem Devastanum* has never been managed by the zemindar since the date of the permanent sunnud, and before that period it is universally admitted that the pandaram in succession, conducted exclusively the devastanum affairs. In Mr. *Parish's* time, attention was paid to the representation of *Mungalaswiree Nauchiar* (1), relative to the misconduct of the pandaram, but this officer does not appear to have been placed by Mr. *Parish* in any way under the control of the zemindar. On general grounds, however, I think that the supervision of the zemindar is advisable to check abuses noted by Mr. *Lushington* and Mr. *Peter*.

"5. I think, therefore, that the pandaram might, without objection, be placed in immediate management of the devastanum of *Rameswarem* and its revenues, that the expenditure and the sibbundy be arranged agreeably to a list, fixed with reference to the usual disbursements, and that the zemindar be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses; and that periodical accounts of receipts and disbursements may be rendered to the huzur, for the purpose of preparing which, a huzur goomastah may be employed at *Rameswarem*.

"6. Concurring with my predecessor, that control over the devastanum expenditure and the devastanum affairs, is necessary

(1) *Ranee Mungalaswiree Naichiar*, who, as zemindar, complained to the collector in 1809.

to preserve its revenues from spoliation, and to enforce a due performance of the necessary and usual ceremonies; as the country of *Ramnad* is under the management of the zemindar's family, I would recommend that the zemindar be nominated to this duty, because they are people of integrity and responsibility, and would, I have no doubt, discharge the duty of supervision with advantage to the interest of the devastanum and their own credit.

"7. The revenues of the *Rameswarem Devastanum* are derived from $70\frac{9}{16}$ villages, the average revenue from which amounts to Rs.46,463 3*a*. 0*p*., the proposed annual expenditure is Rs.38,678, which will leave Rs.7,785 2*a*. 3*p*. for the zemindar's quit-rent and occasional failure. . . ."

By an order of the Governor in Council, dated the 23rd day of October, 1832, the measure proposed in paragraph 5 of this report was approved and directed to be carried into effect, and, accordingly by an order dated the 14th of November, 1832, it was ordered that the said pandaram (*Venkatachellum*) should be placed in full and exclusive possession of the pagoda and the villages and property attached thereto.

The zemindar, however (or the manager of the zemindary), delayed obeying the last-mentioned order, but made an attempt to obtain some share in the management of the pagoda, and addressed an arzi or petition to the then collector (Mr. *Sullivan*), for this purpose. That officer, however, on the 28th of November, 1832, issued an order, which was as follows:—

"To the Guardian of *Ramnad.*

"I have received and perused the Arzi No. 14, addressed by you on the 23rd instant, to the effect that the pagoda of *Rameswarem* and the villages attached to it, should not be put in the possession of the pandaram, and that your man and the pandaram's man should jointly hold the management. Having examined the documents, &c., connected with the above matter for several days, I wrote to the Board the circumstances under which the said pandaram held the said pagoda and the villages attached thereto, for a long time prior to the attachment by the Circar. In accordance with the orders issued in this matter by the Government and the Board, you were ordered to allow the pandaram to hold the said

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pagoda, &c. You should do so immediately. The delay is unfair. You wrote that your servants also should be employed together. This will create a great disturbance. Therefore the custom must be followed up. Nothing can be done contrary to the custom. However, if the said pandaram misbehave for the future, it will be then taken into consideration. If you do not give him possession immediately, the Circar officers shall be sent to put him in possession.

(Signed) "*R. J. Sullivan*, Acting Collector.

"28th November, 1832."

Accordingly the pandaram was, in the year 1832, placed in exclusive possession of the pagoda and its endowments.

About the same time (on the 26th of September, 1832,) the guardian and the manager of the zemindary presented another petition to the Governor in Council, on which, when referred to the collector of *Madura*, the indorsement of the collector was as follows:—

"The governments of ancient times certainly endowed the *Rameswarem Devastanum* with rent-free villages, &c., from which the establishment derives its support; all our records however, shew, that the establishment was superintended by the pandaram, and it is acknowledged by the stanigals of the place that the pandaram has so superintended since the Nabob's government. In my letter to the Board, dated the 20th of September, 1832, I have proposed that the zemindar might supervise the pandaram's management of the devastanum with advantage, so far as to see that no neglect is allowed; but it would by no means be beneficial to the devastanum estate to allow him to have control over the funds. The revenues of the devastanum should be paid into the Circar treasury, from which also the monthly disbursements should be issued: in this case the surplus which remains could be expended as occasion requires for the benefit of the *Rameswarem Devastanum*.

"The Manager of *Ramnad* seems to be of opinion that he has a right to superintend in consequence of endowments made by his ancestors. This ground of claim, however, cannot justly be urged, because two-thirds of the revenues are derived from *Maneyam* villages in the *Tinnevelly*, *Tanjore*, and *Shevagunga* districts, and

all the *Ramnad* devastanum villages are excluded from the permanent settlement.

" *Madura*, 24th January, 1833."

Soon after the appointment of Mr. *Wroughton* as principal collector of *Madura*, the matters in dispute between the zemindar and the pandaram were again brought under consideration, and on the 7th of January, 1834, he sent a report of considerable length to the Board of Revenue, in which are contained the following paragraphs :—

" 12. With regard to the right of the zemindars to appoint pandarams, the present manager possesses no other document except the kararnamah stated to have been executed by the late pandaram, when he was five years of age, to the former zemindar, *Muttu Ramalinga Setupati*, in the year Pramatheetcha, 1793. The several others alluded to were issued in the time of the Setupati, within four successive years, in which he dismisses the pandarams and appoints other persons to the management of the pagoda. It does not appear that the manager possesses any documents or accounts, to prove that any other Setupati had, before or after *Muttu Ramalinga Setupati*, exercised such an authority. The kararnamah said to have been given by the late pandaram when he was five years old is not binding according to law. Moreover, the oppressive conduct of *Muttu Ramalinga Setupati* is well known to Government, which terminated with his confinement at *Madras* and the assumption of the zemindary. Exercising such tyranny, it was easy for him to have obtained any kind of documents from a poor pandaram who was in his power. Such documents are only to be admitted with extreme doubt, if at all.

" 13. It appears generally from the documents and witnesses produced on both sides that it has been the established custom that the dying pandaram nominates one of his disciples, and that the election is reported for the zemindar's sanction and approbation, who thereupon issues orders to the stalathars of the pagoda to shew him the usual respect, and to obey his orders. At the time the present pandaram was nominated, the zemindary was in dispute, and held under the attachment by the collector, so that the orders which would have under other circumstances emanated

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from the zemindar were passed by the collector. The orders were dated 23rd July, 1816, to the late head tahsildar."

The minutes of the proceedings of the Board of Revenue, upon the report of the 7th of January, 1834, being submitted to them, is dated the 30th of July, 1835. After referring to the report and to certain correspondence, the minute proceeds as follows:—

"Upon attentive consideration of the circumstances stated in Mr. *Wroughton's* report, dated the 7th of January, 1834, the Board are of opinion that there exists no ground for questioning the validity of the appointment of *Setu Ramanada*, Pandaram, to the office which he holds in the *Rameswarem Devastanum*, nor any objection on the score of character to his being allowed to retain possession of that appointment.

"The rules proposed in the letter above alluded to appear to the Board to be judicious, and they resolve to authorize their adoption for the future management of the affairs of the pagoda.

"With reference to the suggestion contained in the same letter, the Board leave it to the present principal collector to make such arrangements as may appear to him most likely to conduce to the proper superintendence and the due appropriation of the surplus funds of the pagoda."

The rules referred to in the above extract are the arrangements recommended in the 5th paragraph of the report of Mr. *Vivash*, dated the 20th of September, 1832 (1).

The following rules were, on the 24th of August, 1835, issued by the collector, under the authority of the Revenue Board:—

"The Revenue Board having fully considered the dispute which existed between the Zemindar of *Ramnad* and *Ramanada*, Pandaram, for a long time, regarding the appointment of the latter to the management of *Rameswarem Pagoda*, and of the right of the management of the said pagoda, expressed that there was not the least objection to the appointment made at present of *Ramanada*, Pandaram, to the post of pandaram, and that neither is there any suspicion in his character to continue him in the said post, and admitting the rules hereunder inserted for the management of the

(1). *Supra*, p. 214.

pagoda, recorded their opinion on the 30th of July, 1835; the said opinion is forwarded to this office.

"RULES.

"1. The management of pagoda expenses is stated to be the proper duty of a pandaram. Moreover, the appointment, as well as the removal in the establishment, should be made by the pandaram himself; but all such acts shall be subject to appeal, first to the zemindar, and afterwards to the collector.

"2. Money collected on every account should be deposited in the pagoda treasury itself.

"3. A samprathi, or a person of the zemindar for supervision, should be appointed on a monthly salary of Rs.20, and his pay should be paid out of the pagoda funds; the said *employé* should make an entry of all the receipts and disbursements, he should send a monthly return thereof to the zemindar, under the signature of the pandaram, he should inspect the state of the treasury, which is in the possession of the pandaram, every month, and he should report to the zemindar; an order has been issued to this effect. The said samprathi should not think himself to be an equal *employé* with the pandaram, he should behave himself towards the manager of the pagoda, the pandaram, with as much deference and submission as he would do towards his own master.

"4. The returns which the zemindar may receive as stated above should, at the close of the year, be sent to the collector's office along with the other annual returns of other pagodas that are in the management of *Ramnad* Zemindary.

"5. The special violation of the rules to be observed in the pagoda and the villages attached thereto, as well as the differences should be reported to the zemindar by the first manager pandaram, and the zemindar, if it appears necessary to do so, will institute an inquiry into any subject, and report the same to the collector as usual. As for the efficient management of the pagoda, and for the application of the balance produce for any proper occasion, the principal collector is authorized by the Board to issue any rules which he may deem fit.

"(Signed) *J. Blackburne*, Principal Collector."

The disputes between the zemindar and the pandaram continu-

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ing, the collector placed the pagoda under attachment, and by an order dated the 17th of September, 1836, he stated that he should retain the same until both the disputants sent in a razinamah to the effect that they had made an amicable settlement; the ground as stated being the trouble given by both parties, and their failure to act up to the Board's order of the 24th of August, 1835.

The pandaram then addressed an arzi, or letter, to the collector, which was as follows:—

An Arzi addressed by *Setu Ramanada*, Pandaram, "Vicharnykurther" (1) of *Rameswarem Devastanum*, to the Principal Collector of *Madura*.

"With reference to your order directing attachment of the said *Rameswarem Devastanum*, &c., until an arzi shall be addressed in compromise of the dispute existing between me and the zemindar of the said district, we have entered into a razee (2) to the effect that I shall abide by the directions of the said zemindar in regard to the aforesaid devastanum pagoda villages and sibbundies and other affairs, dispose of all the receipts and disbursements in conjunction with the sumprathi appointed by the said zemindar, and send to the zemindar accounts of receipts and disbursements, with my signature therein. That in addressing arzis to the zemindar I shall state 'addressed by *Setu Ramanada*, Pandaram of *Rameswarem Devastanum*, to the presence of *Setupati Rajah Avergal*, and that the zemindar will, in his communications to my address, state, 'addressed to *Setu Ramanada*, Pandaram of *Rameswarem Devastanum*.' As the zemindar has forwarded an arzi to your presence, praying for making over to me the said devastanum, &c., from attachment, I beg you will be pleased to make over the said devastanum, &c., to me as per mamool.

"(Signed. In Tamil) *Saithoo Ramanada*,
"Pandaram, Vicharnykurther."

"*Thoamytoory*, 9th April, 1837."

In consequence of this arrangement, the pandaram was at once reinstated in the pagoda. The differences between him and the zemindar appear to have revived about 1852; but *Venkatachellum*

(1) A superintendent or manager: Wils. Gloss. 547.
(2) Agreement by way of compromise.

continued in his office of pandaram until he died, towards the end of 1854, having appointed his younger brother's son, *Chockalingum Pillai*, to succeed him. *Chockalingum Pillai* died in the month of February, 1857, and, in like manner, appointed *Chithambura Pillai* as his successor.

Chithambura Pillai appointed *Ambalavana Pillai* (the original Defendant in the suit), as his successor; and upon his death the said *Ambalavana Pillai*, as pandaram, entered into possession of the said pagoda, and continued in possession till his death.

The zemindar refused to recognise these appointments, and a pandaram selected from the family of *Tillianayagam Pillai* about February, 1856, was appointed and confirmed in August, 1856, by the zemindar, under the name of *Setu Ramanada*, his real name being *Mathaiya Pillai*. Eventually the *Ranee*, the zemindar, instituted the suit in which the appeal was brought.

After a protracted litigation in the Zillah Court and the Sudder Adawlut, the case came before the High Court of *Madras*, on the 22nd of July, 1865. It appeared to that tribunal that the issues were not properly framed for the decision of the suit, and that the matters in dispute could be settled only by the determination of the main question in the cause, that of title: "Is the zemindar the real trustee of the pagoda, and the Defendant a wrongdoer, or is the zemindar seeking, without legal title, to possess himself of a valuable property to which, as Defendants allege, he has no title?" On this issue, with the assent of counsel, the High Court heard the case, and arrived at the following conclusions:—

"That the Acts of *Ramalinga*, in the circumstances of the country and of the appointee, could not avail to prove a right of appointment. That except in that time of disturbance no evidence has been given of the exercise of such power; that the production of such evidence would have been easy, and that this powerful family would not, if it had existed, have consented to treat with one over whom, as they now contend, they had the absolute right of appointment and removal.

"That the document of 1837 neither proves nor tends to prove the existence of such a right.

"That during the whole period of the existence of British authority, these opposing parties have been in litigation upon the

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matter, and that the title now claimed has been constantly disallowed, by tribunals having power to pass a provisional decision, and that the provisional decision was never until 1857, long after the statute had run against the claim, questioned in any Court of Justice.

"That the plaint in this case, based not upon any allegation of misconduct, but upon a bare title to remove the pandaram at pleasure, because not appointed by the zemindar, cannot be sustained.

"The groundless nature of the present claim, whatever more qualified right the zemindar may possess, seems to us clear, and we dismiss the original suit with all costs, original and appeal."

From the above judgment of the High Court of *Madras*, the Plaintiffs appealed to Her Majesty in Council.

The argument turned mainly on the history of the endowment, and of the relations between its pandarams and the zemindars, which were minutely examined and discussed. The facts mainly relied upon on each side are noticed in the judgment.

Mr. *Mackeson*, Q.C., and Mr. *Bowring*, for the Appellant:—

The evidence of usage through a long series of years proves that the pandaram ought to be nominated by the zemindar, but if not nominated by the zemindar he ought, at least, to be presented to him for confirmation, and the want of confirmation makes his appointment void. The zemindar is dharmakarta of this pagoda, and it is to be inferred from the very title that his confirmation of the pandaram is necessary.

The depositions taken in 1816 were taken by the authority of the collector. They prove that the pandarams were directly appointed and removed by the zemindars before the year 1793. Very great endowments were conferred on the pagoda by the zemindars. The kararnamah only expresses the usage and custom of the office.

A minor was usually selected to succeed as pandaram. When it is admitted that an infant could be appointed, the difficulty of infancy as to the kararnamah vanishes, for a guardian might sign for him. The person appointed by the zemindar in 1793 occupied

the office for more than twenty years without his title being called in question. The zemindary was attached under Reg. II., of 1811, s. 5, cl. 2, under precept of the Civil Court, on account of the disputed succession. The pagoda of *Rameswarem* and some other pagodas were appurtenant to the zemindary, and were attached along with it, and all that was thenceforth done by the collector in reference to the pagoda was done by him as representing the zemindar.

The petition of *Ramanada,* in 1815, to the collector stating his appointment was merely presented to the collector, instead of the zemindar, owing to the attachment, and shews that the pandaram was used to apply for approval and sanction. The appointment of a pandaram could not be valid if made after the death of his predecessor.

The order made in 1816 for suspending the installation of the pandaram was made by the collector, as representative of the zemindar while the zemindary was under attachment, and the order authorizing the installation was also made in right of the zemindary.

Reg. VII. of 1817 conferred important powers on the revenue authorities, but previously the Board of Revenue and the collector had no judicial power in such matters: Reg. I., 1803; Reg. II., 1803, s. 15; Reg. II., 1806; Reg. XXV. of 1802; Reg. XXVIII. of 1802; *Madras* Sudder Decisions, 1856, pp. 165–6.

From 1817 to 1828 the collector was in possession, not as a servant of the Government, but as representing the zemindar alone, as superintendent.

The acts of the collectors before the passing of the Regulation of 1817 could only have been done by them by virtue of the same right. This view is in accordance with the fact that in April, 1829, after the right to the zemindar had been adjudicated upon by the Privy Council, and the attachment was put an end to, the collector ordered the pagoda to be delivered over with the zemindary to the Setupati, and he assumed the control and management of the pagoda.

In 1829 the zemindar was put in possession, not by mistake—the receipt signed by the zemindar was sent to him by the collector for that purpose.

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The Judges of the High Court attached too much weight to the report of the collectors, which they described as quasi-judicial proceedings, but it is to be observed that paragraph 13 of Mr. *Wroughton's* order states that the election of the new pandaram is reported for the zemindar's sanction and approbation, who thereupon issues orders to the stalathars of the pagoda to shew him the usual respect and to obey his orders. And he also has a right to superintend the management and expenditure, which it is admitted by the collector ought not to remain without some supervision.

The fact that the pagoda villages were not settled for along with the zemindary has no bearing on the case; for the zemindar does not claim a right of property in the villages or in the pagoda.

We ask to remove the pandaram, because he was not legally appointed, the permission of the zemindar as dharmakarta not having been obtained.

The archives of the pagoda are in the power of the Defendant, and would have supplied evidence, if any existed, to shew the appointment of a successor by the pandarams. From the death of the zemindar, in 1829, until 1832, the pandaram was not in management, and all the acts done were the acts of the Court of Wards as representing the minor zemindar. The pandaram was only in joint management with the officers of the government, the pagoda being under attachment.

Mr. *Leith*, Q.C., and Mr. *J. B. Norton* (with whom was Mr. *F. C. J. Millar*), for the Respondents:—

The title of Setupati, or Lord or Protector of the Causeway by which pilgrims approach the temple, does not prove any right of interference in the appointment of the priests or the management of the pagoda. The villages derived from the zemindars of *Ramnad* were only thirteen out of seventy held by the pagoda, and could give the zemindars no claim to the title of founders. The ancient inscriptions shew that the zemindars of *Ramnad* were not the founders of the pagoda. The zemindary of *Ramnad* was permanently settled in 1803, but none of the pagoda villages were included in the settlement. It is usual for religious personages like the pandaram to have the power to appoint their successors. *Norton's* Leading Cases, p. 592. The zemindars of

Ramnad are of a low caste—the Morwar caste—and are eaters of animal food,—the pandarams are of the pure Shiva caste. Therefore it is contrary to all precedent and religious usage and propriety that the zemindar should personally invest the pandaram with the cashayem or red cloth, the beads and the ear-rings, the symbols of the sacred office. *Vencatachellum* must have been regarded by the zemindar *Ramaswami Setupati* as duly appointed, otherwise the latter would not have allowed him to perform the ceremony of tying the parivattom, or cloth of honour, round his head on the day of his instalment. The depositions which form the only basis for the statement that the zemindar appointed and removed certain pandarams before 1793, were merely taken by the servants of the zemindar, who had no authority to take them; they were not taken on oath, nor in the presence of the pandaram. It was only under certain specified circumstances that the kararnamah of 1793 admitted any liability to restraint or removal by the zemindar. Neither the infant pandaram, nor any other pandaram, had any power to bind his successors by a document such as the kararnamah of 1793 (1), and there is no evidence that it was ever acted on, or that the zemindar exercised any control during the life of the pandaram.

The real cause of the attachment of the pagoda was the mismanagement of the pandaram, and it was not attached along with the zemindary, but subsequently. The collector expressly reported to Government that he had delivered the pagoda to the zemindar only as a temporary measure, and the pandaram did not acquiesce in it even as such, and eventually, when it had been ordered to be restored and the zemindar delayed to do so, the collector addressed to him a peremptory order. The zemindar never was in possession except during the period from 1829 to 1832, when he was put in possession for the reason stated. There have been several appointments since 1815, but the zemindar never appointed any one who has had possession.

In 1816 the collector merely recognised the new pandaram as being satisfied that he had been nominated by the dying pan-

(1) *Madras* Sudder Rep. 1858, p. 33; 19 Suth. W. R. p. 216; *Goluck Chunder Bose* v. *Rughoonath Sree Chunder Roy*, 17 Suth. W. R. 444; 1 Beng. L. R. 86; Norton L. C. 592.

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daram. There is no evidence that the pagoda was attached from 1830 to 1846, at the time when the zemindary was under attachment because its owners, the daughters of the last zemindar, were minors; the pandaram, indeed, appears to have been more than once dispossessed and reinstated in the interval. The charge of malversation is not made the subject of any specific statement, nor established by any proof.

Mr. *Mackeson*, Q.C., in reply.

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Their Lordships took time to consider their judgment, which was now delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH:—

The question raised in this appeal relates to the right of the zemindars of the large and important zemindary of *Ramnad* in the *Madura* district, either to appoint, or to confirm the election of, the pandaram or head of the celebrated and richly endowed pagoda of *Rameswarem*.

The possessions of this temple are estimated by the Appellant to be of the value of £200,000.

The plaint of the Ranee zemindar (now represented by the Appellant, the present zemindar), filed so long ago as the year 1857, sought to oust the original Defendant, *Ambalavana Pillai*, from the office of pandaram which he *de facto* held.

It alleged that the zemindar was the dharmakarta or trustee of the pagoda, and had the right to conduct the management of it. It directly also asserted her right to appoint the pandarams, and concluded with a prayer for a decree to the effect that the zemindar should conduct the management of the pagoda, and that the Defendant pandaram should be removed from the management, and pay over the money in his hands to the zemindar.

The Plaintiff also charged the pandaram with misappropriation of the property, and the prayer for his removal was based on this charge, and also, though vaguely, on the ground of his not having been appointed to, or confirmed in, the office by the zemindar.

The charges of misappropriation were not sustained by the evidence and have been abandoned; so also has the claim of the zemindar to be placed in the direct management of the pagoda,

and to have its funds placed in his hands. And the single question argued at their Lordships' Bar, and to which issue the cause was brought by consent in the High Court is, whether the zemindar has established the right to appoint or to confirm the election of the pandarams of this great pagoda, and was entitled to a decree for the removal of the Defendant from the office of pandaram because he was not so appointed or confirmed.

The early history of the pagoda is obscured by time, and its foundation cannot be shewn. But it is evidently an ancient temple of great renown, which has long attracted pilgrims from all parts of *India*. It is situate on an island in the extreme south of *India*, connected with the lands of the zemindary by a causeway. The Rajahs of *Ramnad* were the guardians of this causeway, and had thence acquired the title of *Setupati*, or *Lord of the Causeway*.

It is asserted on the part of the pandaram that the pagoda of *Rameswarem* was an independent endowment, in which the Rajahs Setupati had no rights of patronage, or control, other than the general authority they assumed as the rightful or *de facto* rulers of the district, to prevent abuses in the management of its affairs, and to see that its laws and usages were properly observed.

The first records in the evidence are some inscriptions on stones found in the walls of the pagoda. The earliest inscription is on a mandapam, and states that the mandapam was erected by *Munerama Nathan* "as a place to halt for the god *Ramesar*, who was attached to this pagoda, founded by *Mall* or *Vishnu*." Its date is in the Salivahana era 1520, which corresponds with the Christian year 1588. It is evident from this and other inscriptions that the pagoda was an ancient temple at this time.

Subsequently, in the year of the Salivahana era 1607, the Rajah of *Ramnad* made a gift of five villages, and in 1609 another gift of eight villages to the pagoda. These grants, as the dates shew, formed no part of the original endowment of the pagoda, and no condition is found in them creating or reserving any rights of patronage or interference in the affairs of the temple. There is evidence of similar gifts of villages from other Rajahs, among them the Rajah of *Sivagunga*, shewing that the pagoda had been endowed by other donors than the *Lord of Ramnad*. Indeed, of the seventy villages belonging to the pagoda, thirteen only are proved

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to have been given to it by that Rajah. The right, therefore, now claimed by the zemindar of *Ramnad* is not shewn to have an origin in the foundation or subsequent endowment of the pagoda.

It may be observed, before further considering the evidence, that the case on both sides is singularly deficient in materials to elucidate the constitution of the community or brotherhood attached to this pagoda, the duties of the pandarams, and whether they are selected from a particular family or class. The claims of the zemindars also have been put forward in the most uncertain way. They at one time asserted a right to be chief managers, and directly to appoint the pandarams as sub-managers, but that claim was not strongly urged by Mr. *Mackeson* at their Lordships' Bar. He mainly contended, in his elaborate argument, for the right to have the pandarams presented to the zemindars for confirmation when nominated or elected by others. It is obvious, however, that there is a great distinction between a right to appoint and one to confirm; and if the latter only is insisted on, it still might be expected that some definite information would be given as to the manner of electing the candidate to be presented for confirmation. The absence of such evidence may perhaps be accounted for by the fact that the claim it was at first attempted to sustain was the right of direct appointment.

It is not, however, unimportant to observe that it appears to be the common practice in the *Madras* Presidency for pandarams to appoint their successors. (See Mr. *Norton's* Leading Cases, pp. 592–3.)

But the constitution and rules of religious brotherhoods attached to Hindu temples are by no means uniform in their character, and the important principle to be observed by the Courts is to ascertain, if that be possible, the special laws and usages governing the particular community whose affairs become the subject of litigation, and to be guided by them.

That principle was laid down by this Committee in an appeal involving the succession to the office of mohunt of a richly endowed mutt in *Rajgunge* in these terms:—"It is to be observed that the only law as to these mohunts and their office, functions, and duties, is to be found in custom and practice, which are to be proved by testimony." (See 11 *Moore*, Ind. Ap. Ca. 428.)

In this case the burden of proving that the right he claims is supported by usage lies upon the zemindar, and the question to be decided is, whether he has sustained it.

It was contended on his behalf that the zemindar of *Ramnad* is dharmakarta of the pagoda, and that it must be inferred from this title he had the power he claims. But the right to bear this title, and the functions belonging to its holder, are among the disputed questions involved in the general controversy between the parties. The title "Dharmakarta" may have a definite signification, but their Lordships observe, in the proceedings of this record, it is used in different senses, sometimes to denote a trustee who appoints the pandaram, or head manager, and sometimes the manager himself. In the long contention which took place between the zemindar and the pandaram in the collectorate, as to the titles by which each was to address the other, the collectors refused to allow either to assume this title. Their Lordships, upon the imperfect information disclosed by the record, will therefore abstain from using this appellation, and will not attempt to define what the title as regards this pagoda indicates, or to whom it belongs; but will proceed to consider the substantial issue they have to determine, viz., whether the zemindar has established the right, under whatever name, to make or confirm the appointment of pandarams.

It has been already stated that he has failed to shew that such a right is derived either from the original foundation or any subsequent endowments of the pagoda by his predecessors.

The Counsel for the zemindar strongly relied on statements found in certain depositions as affording proof of the direct appointment and removal of pandarams by the Rajahs of *Ramnad* prior to the Christian year 1793; and if these statements were admissible and trustworthy, they would afford strong support to the zemindar's case. The depositions were taken in 1815, on the death of Pandaram *Ramanada*, who had held the office from 1793. On his death *Venkatachellum* claimed to be his successor, alleging that he had been appointed by his predecessor according to custom. Objections were made to Mr. *Peter*, the Collector of *Madura*, against his appointment, upon the ground that he had not been nominated by the dying pandaram, but had been put

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forward after his death by certain persons attached to the pagoda. The collector required the head tahsildar to make inquiries as to the fact and time of *Venkatachellum's* appointment, and several depositions, the authenticity of which is not questioned, were taken by him, bearing on this matter. The statements in question appear to have been made at this time, but there is no satisfactory evidence to shew they were obtained by any competent or independent authority. It is suggested that they were taken by the tahsildar, but there is no proof of this, and the tahsildar's report is not forthcoming. On the other hand, the form of the documents leads to the inference that they were not so taken. They are addressed "to the Company's Circar," signed by the deponents, and attested by two native witnesses, from which it may be inferred that they were written statements obtained on behalf of the zemindar, and sent to the tahsildar to be forwarded to the collector. Their Lordships think that such statements ought not to be received as proof of an important right, and that they were properly rejected as inadmissible by the High Court.

The first appointment of which there is trustworthy evidence occurred in 1793. In that year *Muttu Ramalinga*, then Setupati of *Ramnad*, appointed *Ramanada* to be pandaram.

Mr. *Nelson's* "Manual of the *Madura* Country," compiled by order of the *Madras* Government, describes the disturbed state of *Ramnad*, and the rest of *Madura* at this time, and for some years previously. A British force had been employed against the Setupati to enforce the rights of the Nabob of the *Carnatic*, and the district had afterwards passed under the direct authority of the British Government. This appointment of *Ramanada* was near the period of the transition of the sovereign power from the Nabob to the British Government. It appears from the authority above cited that, in 1792, *Muttu Ramalinga* shewed symptoms of rebellion against that Government, and in 1795, he was deposed, and his sister, the Ranee, installed in the possession of the Raj. It was with this Ranee the permanent settlement was made in 1803 (1).

The Pandaram appointed by *Muttu Ramalinga* in 1793, was only five years old, and he took from this child a kararnamah, which is much relied on by the Appellant.

(1) See Part IV. p. 154.

It commences thus:—"As you have been pleased to appoint me for the management of the affairs of the pagoda at *Rameswarem*, I will cause puja to be duly performed in the pagoda," &c.

The instrument also contains the following passages:—

"In case of my dealing friendly with the enemies of the zemindary you may remove me, and appoint another person in my room. . . . . If I act improperly in these affairs, I shall submit myself to the orders of the zemindar."

This appointment, and the kararnamah which followed it, would, under ordinary conditions, be entitled to great weight, but when the disturbed state of the district and the age of the pandaram are regarded, the transaction loses much, if not all, of its force as evidence of the right claimed.

Ramanada filled the office of pandaram until his death in 1815. After this date much valuable evidence is afforded by the proceedings of the collectors.

The permanent settlement, as already stated, was made with the Ranee in 1803: but this settlement did not include the villages belonging to the pagoda, which had long been held free from tribute. Some years before 1815, both the zemindary and the pagoda had been under attachment. It was contended that the pagoda had been attached as part of the zemindary; but, although the orders of attachment are not set out, enough appears on the record to negative this suggestion. It was not until after the zemindary had been attached in consequence of a disputed succession, that the pagoda was placed under attachment on account of the alleged mismanagement of the pandaram.

Such was the state of things in 1815, when *Venkatachellum* claimed to be pandaram on the nomination of his predecessor. Two documents appear on the record, both dated 19th July, 1815, and addressed to the collector; one from the dying pandaram *Ramanada*, stating that he had appointed *Setu Ramanada* (*Venkatachellum*), whom he describes as "a relation of mine by blood, and a descendant of our family," to be his successor; and another from *Venkatachellum* announcing his appointment, praying for instructions for his guidance, and that the attachment of the pagoda might be removed.

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The Ranee Setupati disputed this appointment. In a letter of the 3rd August, 1815, she prays the collector to prevent his being invested with the parivattom cloth, and the other emblems of office. An inquiry was thereupon directed to ascertain whether *Venkatachellum* had been appointed by the dying pandaram; and before receiving any report from the tahsildar, the collector, on the 9th August, directed that officer to inhibit the installation of *Venkatachellum* as pandaram "until further orders."

This temporary injunction was, however, removed by the same collector by an order of the 27th of July 1816, directing the tahsildar that *Venkatachellum* should be installed as pandaram with all usual ceremonies according to custom, and he was installed accordingly.

It was contended for the Appellant that the order suspending the installation was made by the collector as the representative of the zemindar, whilst the zemindary was under attachment, and that the order authorizing it was a new appointment of *Venkatachellum* in the same right.

Their Lordships are unable to concur in this view of the acts of the collector. They think the proper construction to be placed on his action in the matter is, that the orders first suspending, and then directing the installation, were made by him as a public officer on the part of the Government, and not in virtue of any right derived from the zemindar. It also appears to them that the last order did not profess to be, and was not, an original appointment, but was an act of the collector to give effect to the title derived from the nomination of the former pandaram. They are consequently of opinion that *Venkatachellum's* title to the office must be considered to rest upon the nomination of his predecessor, and not upon any appointment or confirmatory act proceeding from the zemindar.

It will be convenient to consider what powers the Board of Revenue and the collectors possessed, or *de facto* exercised in relation to religious houses.

The proceedings upon the accession of *Venkatachellum*, above described, took place before Regulation VII. of 1810 was passed. But it is evident that before that regulation the British Government, by virtue of its sovereign power, asserted, as the former Rulers of the country had done, the right to visit endowments of

this kind and to prevent and redress abuses in their management.

There can be little doubt that this superintending authority was exercised by the old rulers. Mr. *Nelson* in the *Madura* Manual says: "The principal pagodas, with their enormous establishments, their officiating priests, &c., were managed by a dharmakarta, or trustee and manager for life, who, as stated above, was usually a monk and guru." He had said just before—"The manager of the great pagoda at *Madura* seems to have been always a pandaram or saiva monk." Mr. *Nelson* evidently designates the manager, and not the person appointing him, as dharmakarta, who might be a monk or pandaram, in which case he would probably be known by the latter title. He then describes the duties of the manager:—"He collected and disbursed the revenues derived from the lands granted to the pagoda by the King and others, and from fees and offerings; appointed the officiating Brahmans and servants," &c.

He then says:—"The dharmakartas held but little communication one with another, and recognised no earthly superiors except the King himself. Each was independent of all control, and acted altogether as he pleased. This freedom led naturally to gross abuses, and the King was compelled occasionally to interfere in the management of some of the churches." (Part III. chap. 7, p. 102.)

The King here spoken of was the ruler of *Madura;* but there is little doubt that the Setupatis of *Ramnad*, although the vassals of the Pandya of *Madura*, exercised sovereign power within their own territories. Mr. *Nelson* says:—"There is, therefore, a considerable amount of evidence which goes to support the claim to high antiquity put forward by the *Ramnad* royal family. And, seeing that *Rameswarem* has been resorted to annually by large bodies of pilgrims, and that this would have been simply impossible unless some strong-handed prince or princes were ruling over the country in the neighbourhood, I think it may be pretty safely concluded that the principality of *Ramnad* had been in existence for many centuries before *Sadeika Sevan* (who seems to have lived in the sixteenth century) was made Setupati." (Manual, p. 111.)

It appears, therefore, to be highly probable that the Setupatis in the days of their power exercised control over the pagoda, not,

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however, in virtue of any proprietary right of patronage, but as the rightful or *de facto* rulers of the district. The powers they enjoyed as Sovereigns, whatever they may have been, have now passed to the British Government, and the present zemindars can have no rights with respect to the pagoda other than those of a private and proprietary nature, which they can establish by evidence to belong to them.

That the new rulers, at an early date, exercised a controlling supervision and authority over the temples very clearly appears from a letter written in 1803, by the Board of Revenue to Mr. *Hurdis*, the Collector of *Madura*, of which the following extracts are printed in the Manual (Part IV., chap. 5, p. 130):—

"The subject of devastanum lands is of great importance to the happiness of the people, and the attention paid to the interests of the pagodas by the immediate officers of the Government has been attended with the most beneficial consequences to the people in different parts of the peninsula."

After saying that the Governor-General had directed that the collector should proclaim the restoration of the lands resumed from the pagodas by the late Government, the letter proceeds thus:—

"The administration of these lands forms a distinct question. The extensive abuses found to prevail with respect to these lands, with which the pagodas of *Dindigal* were endowed, render it expedient that the lands as affairs of the pagodas of *Madura* be conducted in the same manner as those of *Dindigal, under the immediate care of the collector.*"

It is abundantly clear from this letter that long before Regulation VII. 1817, the British Government not only assumed the power to superintend the management of the property and affairs of the pagodas throughout the Peninsula, but exercised its authority through the agency of the collectors.

The preamble of the Regulation of 1817, after stating that large endowments had been granted by former Governments as well as by the British Government and individuals for the support of temples, and that the produce of such endowments were, in many instances, misappropriated, declares it to be "the duty of the

Government to provide that all such endowments be applied according to the real intent and will of the grantor." It then enacts that the general superintendence of all endowments should be vested in the Board of Revenue, and prescribes the duties to be performed by them to prevent misappropriation of the funds. It also authorizes the Board to appoint local agents, and declares that the collector of the district shall be *ex officio* one of such agents. (Sect. 7 and 8.)

The Counsel for the Appellant, whilst admitting that the proceedings of the collectors subsequent to this Regulation might be equivocal with regard to the character in which they acted, strongly insisted that the acts of those officers prior to it could only have proceeded from, and must therefore be referred to, the rights of the zemindar vested in them under the attachment. This contention is, however, entirely disposed of, when it is established that at an early date the power of superintendence was intrusted by the Government to the Board of Revenue, and the collectors. The Regulation, in fact, merely defined the manner in which that power was thenceforth to be exercised.

The general authority of the collectors as agents of the Government being thus shewn, the ground is cleared for considering the question which was so much discussed on the argument, whether the collectors in the various proceedings found in the record were acting under such general authority, or, as the Appellant asserts, in virtue of the rights of the zemindar.

From 1815 until 1828, during the whole of which time both the zemindary and the pagoda were under attachment, there is no doubt that the pagoda was managed by the pandaram under the control of the collectors, even in minute details, but the Counsel for the Appellant did not establish to their Lordships' satisfaction the inference he sought to draw from this evidence, that the collector's interference arose from his representing the zemindar's interest. On the contrary, considering that the pagoda had been attached for the alleged misconduct of the pandaram, and having regard to the powers of superintendence entrusted to the collectors as agents of the Government, both before and under the Regulation of 1817, they think that their interference ought to be referred to the exercise of these powers. This view is supported by the reports of

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the collectors made during a subsequent attachment to be presently adverted to.

The long litigation respecting the succession to the zemindary ended in 1828, when a judgment of His Majesty in Council established the title of *Ramaswami Setupati* to the zemindary of *Ramnad*.

The attachment which had so long existed was thereupon removed. It appears from an order of the collector, dated the 21st of April, 1829, addressed to *Ramaswami Setupati*, that on this removal the pagoda was ordered to be delivered over with the zemindary to the Setupati, and for some time he appears to have assumed to control the management of it, as the collectors had done. The Appellant's Counsel urged that this delivery of possession to the zemindar, besides being in itself strong evidence in his favour, threw light on the proceedings of the collectors throughout the time of the attachment. If the orders relied on had not been corrected, they might have been rightly so regarded; but they were, after full inquiry, superseded by subsequent orders hereafter referred to.

On the 21st of April, 1830, *Ramaswami Setupati* died, having devised the zemindary to his two daughters. Both being minors, the management of the estate became vested in the Board of Revenue, acting as the Court of Wards, and so remained until 1846, when, on the death of the minors, the zemindary was restored to their mother, *Rani Setupati*, who was the original Plaintiff in the present suit.

Whilst the estate was under the care of the Court of Wards, a manager was appointed on behalf of the minor zemindars. Disputes appear to have arisen between this manager and the pandaram, in consequence of the latter being kept out of possession of the pagoda, and the manager assuming the control of it.

The then collector, Mr. *Vivash*, being appealed to by both, investigated their complaints, and on the 20th of September, 1832, made a report to the Board of Revenue, which is well worthy of attention.

In that report, paragraph 2, Mr. *Vivash* says:—[See *ante*, p. 213.]

This statement confirms the view their Lordships derived from the evidence, that, under the attachment, the collectors acted as

the agents of the Government in superintending the pagoda. It also shews that when, on the discharge of the attachment in 1839, the pagoda was entrusted by Mr. *Vivash* to the zemindar's care, it was not so done because of any right belonging to him as zemindar, as the Appellant alleges, but as "a temporary measure" in the absence of the sub-collector: the zemindar, being a responsible person selected by the collector, to have the care of it until the Board had decided upon the future management.

This view is confirmed by the statements of fact contained in other parts of the report. Paragraph 3 states that the pandaram appointed in 1815 was not allowed, as his predecessor, exclusive control, but "was ordered jointly with the Circar servants to conduct the devastanum affairs."

Again, paragraph 4, says:—"The *Ramnad* zemindar, or rather the manager on the (minor) zemindar's behalf, urges his right to the management. . . . . It appears to me unnecessary to dwell upon this claim, as the *Rameswarem* devastanum has never been managed by the zemindar since the date of the permanent sunnud; and before that period it is universally admitted that the pandarams in succession conducted exclusively the devastanum affairs."

It may be allowed that this latter statement ought not to be relied on as proof of the fact said to be admitted, but what the collector says of the practice since the permanent sunnud would be derived from official records and experience.

Mr. *Vivash* further reports that, in his opinion, the supervision of the zemindars would be useful to check abuses, and his recommendations are contained in paragraphs Nos. 5 and 6:—[See *ante*, p. 214.]

It appears that this report was laid before the Governor in Council, and a letter was thereupon written, and transmitted through the Board of Revenue to the collector, approving of his proposed measures, and directing them to be carried into effect.

The collector afterwards sent an order to the manager of the zemindary, under the Court of Wards, directing him to put the pandaram in possession of the pagoda. The manager having hesitated to obey it, the collector issued the following peremptory order:—[See *ante*, p. 215.]

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Nothing can be more decisive than this action of the collector on the question of the character in which he was acting. So far from relying on the right of the zemindar, he acted in direct opposition to the claims of his guardian.

The pandaram (*Venkatachellum*) having thus been restored to full possession of the pagoda, the manager for the zemindar again put forward his claim to the management, and on this occasion he impeached the validity of the title under which the pandaram had held the office since 1815, asserting the zemindar's right to appoint the pandarams as well as to manage the pagoda.

This new dispute was referred to the then collector, Mr. *Wroughton*. His report upon it is dated the 7th of January, 1834. It appears that he examined the depositions sent to the collectorate in 1815, and other documents, and he records the facts which, in his opinion, are adverse to the claims made on the part of the zemindar. He also reported in favour of the title of the pandaram *Venkatachellum* to the office.

The Board of Revenue upon this report made a minute on the 30th of July, 1835, that there existed no ground for questioning the validity of the appointment of the pandaram.

One of the objections urged by Mr. *Mackeson* to the judgment of the High Court was that the Judges had given too much weight to the reports of the collectors, which they described as "quasi judicial proceedings." It is to be observed, however, that it is the duty of the collectors, under sect. 10 of the Regulation of 1817, to ascertain and report to the Board the names of the present trustees, managers, and superintendents of the temples, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment by the founder, or under any general rules. They are also, under sect. 11, to report all vacancies, with full information to enable the Board to judge of the pretensions of claimants, and whether the succession has been by descent, or by election, and if so, by whom. The report, therefore, of Mr. *Wroughton* was entirely within his province, and the line of his duty.

Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or

force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded upon them.

Whilst protesting against the weight given by the High Court to Mr. *Wroughton's* report, Mr. *Mackeson* invoked the authority of the collector's opinion contained in the last paragraph of it, in aid of his contention that the appointment was invalid without the zemindar's confirmation.

The paragraph is as follows:—[See *ante*, p. 217.]

The opinion of Mr. *Wroughton* is clearly against the claim of the zemindars to nominate to the office, and it may be doubtful whether he intends to support their pretension to a right of confirmation in the sense of a power entitling the zemindar to reject the person elected, and to treat the pandaram who enters upon the office without his confirmation as an usurper.

But however that may be, their Lordships have already said that the opinions of the collectors are not to be treated as having judicial authority. They also think that if the opinion of Mr. *Wroughton* really is to the effect contended for, it is not well founded. They have already commented on the effect of the orders passed by the collector in 1816.

It is very probable that the pandarams, on their election, were presented to the Setupati, not for the confirmation of their title, but to obtain from him, as the great chieftain of the district, a recognition of it, and to secure his protection and support.

In consequence of the recommendations contained in the reports of the collectors (1832 and 1834) rules were drawn up for the superintendence of the pagoda. They were to the effect that the pandaram was to be the manager, but an officer of the zemindar was to superintend the management, reporting to the zemindar, who was to send in the reports to the collector. It was expressly declared that this officer should treat the pandaram with great respect.

This state of things again led to frequent disputes. Mr. *Blackburne*, the collector, writes to the Board that he had received no

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less than forty-two recriminatory complaints in eleven months from the manager of the zemindary and the pandaram. In consequence the pagoda was again placed under attachment; and the collector, on the 17th of September, 1836, addressed orders to the pandaram and the manager, stating that, as they gave vain trouble, and did not act up to the Board's orders, the management would be kept under attachment on behalf of the Circar until they came to an amicable settlement.

In April, 1837, the disputants came to a formal compromise, and the pandaram promised to submit to the superintendence of the manager, and do certain things in conjunction with him. The razeenamah drawn up on this occasion was strongly relied upon by the Appellant's counsel. Taken by itself, this agreement would certainly appear to recognise the manager as superintendent in right of the zemindar; but, having regard to the recommendations in Mr. *Vivash's* report, paragraph 5, that the zemindar should be appointed supervisor, with authority to interfere in controlling expenditure and checking abuses, their Lordships think that the acknowledgment must be referred to the power entrusted to the zemindar as the nominee of the Government. Even if it had been shewn that some power of superintendence resided in the owners of the zemindary, it would not at all follow that the right to interfere in the appointment of pandarams belonged to them.

Pandaram *Venkatachellum* continued in office until his death in November, 1854, having filled it since 1815.

Before his death he appointed as his successor, *Chockalingam Pillai*, who continued in office until his death, in February, 1857. He appointed *Chidambara Pillai* to succeed him, who died shortly afterwards, having first nominated *Ambalavana Pillai*, the original Defendant in this suit, to be his successor.

It results from a review of the whole mass of evidence in this case that there is no instance of the appointment of a pandaram by the zemindars satisfactorily proved, except that of the child by *Muttu Ramalinga*, in 1793, nor of any pandaram having been kept out of his office, or ejected from it, because the zemindar had not confirmed his appointment.

In the absence of proof of the actual exercise of either of the rights claimed, the rest of the evidence, for the reasons already

given, is in their Lordships' opinion wholly insufficient to maintain them. They are therefore of opinion that the Appellant has failed to establish his pretension to oust the pandaram from his office, because he was not appointed to, or confirmed in it by him or his predecessors.

In the result they will humbly advise her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

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Solicitors for the Appellant: *Gregory, Rowcliffes, & Rawle.*
Solicitors for the Respondents: *Jones, Blaxland, & Son.*

CHEDAMBARA CHETTY . . . . . APPELLANT;

AND

RENGA KRISHNA MUTHU VIRA PUCHAIYA NAICKAR, ZEMINDAR OF MARUNGAPURI . } RESPONDENT.

J. C.* 1874 *May* 7, 8.

On Appeal from the High Court of Judicature at Madras.

The Mofussil Courts of *India*, administering justice according to the broad principles of equity and good conscience, will not apply the English law of champerty and maintenance according to the practice of the English Courts, but they will consider whether a transaction impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation; and they will not allow a stranger to interfere in family affairs by an agreement between him and the real heirs that he should be entitled to a share of the estate.

Case of *Fischer* v. *Kamala Naicker* (1) distinguished.

A., a stranger, advanced money to enable *B.*, *C.*, and *D.*, childless Hindu widows, upon a false claim of inheritance, to take the estate of the family from *E.*, the rightful heir; *A.* got the entire control of the suit and of the affairs of *B.*, *C.*, and *D.*; and *B.*, *C.*, and *D.* executed an instrument purporting to secure to *A.* a large sum of money upon their obtaining the property, and also gave him their bond for a sum alleged to have been advanced by him.

B., *C.*, and *D.* having agreed with *E.* to withdraw the suit upon terms of

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* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT. HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, and THE RIGHT HON. SIR LAWRENCE PEEL.

(1) 8 Moore's Ind. App. Ca. 170.

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compromise, *E.* was induced to enter into a bond to *A.*, by which *E.* in effect engaged to pay to *A.*, in discharge of his claim upon *B.*, *C.*, and *D.*, a fixed sum, which was claimed by *A.* as the amount due to him; and *A.* agreed to abandon his claim upon them on such payment, retaining the securities he held from them until *E.*'s bond was satisfied.

At the time of entering into this bond, *E.* had only just attained his majority, was without proper counsel or assistance, and was threatened by *A.* with the consequences of not immediately acquiescing in his demand, the threats not being of bodily violence, but of carrying on the suit to his ruin; and such threats overcame his free will, and induced him, contrary to his own judgment and sense of right, and without any evidence that the sum claimed was due, to execute the bond.

On a suit by *A.* to enforce the bond:—

Held, that the taking of the bond from *E.* did not amount to novation; that the bond was wholly invalid as against *E.*, and could not even be made to stand as a security for what might really have been advanced by *A.* to *B.*, *C.*, and *D.*, as nothing was ever due from *E.* to *A.*, and there existed no privity of contract between them.

THIS was an appeal from a judgment and decree of the High Court of Judicature at *Madras*, affirming a revised judgment and decree of the Civil Court of *Trichinopoly*, made in a suit brought by the Appellant against the Respondent to recover the amount of an instrument in writing called a loan bond for the sum of Rs.67,000, together with interest.

The late zemindar of *Marungapuri* died, leaving his half-brother, the Respondent, and three widows, of whom *Lekka-mani* was the senior, the sole members of an undivided Hindu family.

The Respondent, who was then a minor, was (with the full concurrence of the widows) recognised and—it was contended—nominated as the legal successor by the Government of *Madras* on the 17th of September, 1864, and the collector took charge of the zemindary under the Court of Wards, Act V., of 1804, the widows accepting the usual allowance from the collector for their maintenance.

In the year 1866, however, they discontinued their receipt of maintenance and set up a claim to the zemindary, on the ground that the Respondent was of illegitimate birth, and that they were entitled to it by inheritance; and, on the 21st of December, 1866, notwithstanding a prohibition of dealings with them issued by the

collector under the *Court of Wards Regulation*, 1804, they entered into an agreement (marked B.) with the Appellant, who was a banker. The following is the material portion of the agreement:—

"As with reference to the moneys to be borrowed of you by executing loan bonds in view to meet the expenses incidental to suing out (our claims) in the Revenue and Civil Courts and before the superior authorities respecting our zemindary, which is now held by the Court of Wards in their management on behalf of another to whom it is intended to be transferred, and to meet our maintenance expenses, we have agreed, of our own free will, to repay, on demand, the amount so borrowed of you, with interest at the rates provided for in such bonds, and in consideration of the aid you propose to give us in money and in exertions towards establishing our title to the said zemindary, to pay you as allowance and gratuity, immediately after the zemindary is granted to us, one lac of rupees out of the incomes thereof, and a moiety of the surplus proceeds that may be transferred to us by the Court of Wards; you shall accordingly prosecute the claims, and shall, immediately after the said zemindary is granted to us, have the zemindary under the management of your own agent, disburse the maintenance amounts due to us as per agreement, the peshcush (revenue), and the establishment charges, and pay yourself from the surplus proceeds the lac of rupees above agreed to be paid to you, and we shall redeem the zemindary from your agent's management only after the said amount has been fully paid to you. In the meantime we shall not transgress the directions of your agent in the matter either of the said claim or of our household affairs, &c., or of the management of the zemindary. If, on the contrary, we fail so to conduct ourselves, we agree of our free will to pay you at once, without any objection, from out of our assets and those of our heirs, the principal and interest due on the loan bonds, the allowance of one lac of rupees agreed above to be paid, and the amount forming a moiety of the surplus proceeds remaining with the Court of Wards on that day. We further agree not to execute any bonds in the matter of this claim or debts to anybody other than yourself."

On the 6th of May, 1867, the widows gave the Appellant

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a loan bond (marked C.), the material part of which was as follows:—

"For the costs of the suit which is now pending about the frauds used against our zemindary, for our domestic expenses, and for the discharge of the debt contracted by us heretofore, we have this day borrowed of you Rs.20,000.

"These Rs 20,000 we shall pay on demand in cash, with interest thereon at 1 per cent. per mensem. That this loan bond is executed with our free will."

In September, 1868, the Appellant instituted suit No. 30 of 1868, in the Zillah Court of *Trichinopoly*, in the name of *Lekkamani*, the senior widow, against the collector of *Trichinopoly*, the agent of the Court of Wards and representative of the Respondent's estate, for the recovery of the zemindary and other property of the value of Rs.411,997. 2*a.* 1*p.*, on the grounds above mentioned.

The Respondent, who had then just come of age, was put in possession of the zemindary by the collector on the 23rd of July, 1869. *Lekkamani* immediately, on the 28th of July, 1869, applied to the Court to make the Respondent a party to the suit, and he was made a Defendant on the 2nd of August, 1869.

The suit was set down for final hearing on the 16th of August, 1869. On the application of *Lekkamani* a commission was issued by the Civil Court to take the evidence of the three widows and the late zemindar's sister in their palace. The commissioners arrived at *Marungapuri* on the 11th of August, 1869.

Immediately after the arrival of the Commissioners, *Lekkamani* proposed to the Respondent that the suit should be settled, and he executed an instrument called a razeenamah, which purported to compromise the suit between him and the widows by his assigning certain villages for their maintenance, and he also, at the instance of the Appellant, under circumstances which formed the main subject of inquiry in the suit out of which the appeal arose, gave to the Appellant the bond marked A., the material part of which was as follows:—

"With reference to the dealings which you had heretofore held with *Lekkamani* and others, widows of my elder brother *Tirumalai*

Poochai Naiker, the late zemindar, on account of their maintenance and court costs, as per a loan bond for Rs.20,000, and an agreement for Rs.100,000, the accounts being adjusted up to date, the sum which was found due by them, and which alone was assigned to be paid by me is Rs.67,000. As I have undertaken to pay you the same, I hereby bind myself to pay you the said sum of Rs.67,000 within the 30th of September of the current year, and get back this bond, and the bond and agreement above referred to. On failure to pay the money within the above prescribed time, I bind myself to pay you on demand the said sum of Rs.67,000 with interest at one-half per cent. per mensem, and receive back this and the aforesaid bonds."

The razeenamah was presented to the Court, but Mr. *Norton*, who had been the counsel for the collector as guardian, and who appeared that day as counsel for the Respondents—before the razeenamah was filed—obtained an adjournment. On the 31st of August the case came on for final hearing. Mr. *Norton* then, as Advocate-General, acting for the collector alone, objected to the reception of the razeenamah by the Court, on the ground that the estate was not hereditary, and that the Respondent held it only by the nomination of the Government, which being an act of state could not be questioned in the Court. On this ground the Judge dismissed the widow's suit with costs.

The case was brought before the High Court of *Madras* on appeal by the widow, who prayed for a decree in accordance with the terms of the razeenamah, but the Respondent's counsel refused to be bound by it, and the High Court did not give it effect, and in fact the litigation was continued through all its stages irrespectively of the razeenamah.

The Appellant having sued the Respondent for payment of the bond for Rs.67,000, the Respondent resisted the demand on the ground that the bond had been obtained from him by threats and fraud, and without consideration, just upon his attaining majority, and in the absence of legal or other advice.

The cause having come on for trial (on remand from the High Court) before Mr. *Davidson*, the Zillah Judge of *Trichinopoly*, a great deal of conflicting evidence was given as to the circum-

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stances under which the bond was executed, and the Judge, on the 10th of November, 1871, pronounced his decision, from which the following passages are extracted:—

"The case for the Plaintiff is this, and it is not disputed by the Defendant, that on the very day of the arrival of the Commissioners at *Marangapuri*, viz., the 11th of August, two messengers, by name *Thavar Naick* and *Marudannyagam Pillay*, the sixth witness for Plaintiff and the first for Defendant, were despatched in hot haste to fetch the Plaintiff from *Shevagunga*, and it is admitted that he reached *Marungapuri* on the evening of the 14th idem. But meanwhile, viz., on the 12th idem, the Defendant had been induced to give a note of hand for Rs.62,000 in the name of one *Runga Iyengar*, in acknowledgment, it is alleged, by the Plaintiff, of his having accepted all *Lekkamani* and the other widow's obligations to Plaintiff, on account of the bonds B. and C. for one lac, and for Rs.20,0000 respectively, together with certain debts which the widows had subsequently contracted, and on the following day, viz., the 13th idem, the razeenamah, Exhibit No. VI., was executed.

"The Plaintiff asserts that on the forenoon of the 15th idem, he and the Defendant, together with certain others named, proceeded to the widow *Lekkamani's* palace, where, after certain accounts had been looked into, it was ascertained that a balance of Rs.54,000 was due by the widows to the Plaintiff; that the Defendant then, of his own free will, signified his readiness not only to accept that liability on their account, but also undertook to pay the Plaintiff Rs.12,500, or one-eighth of a lac of rupees, in extinguishment of the bond B. for Rs.100,000, making a total aggregate sum of Rs.67,000, for which amount he, on the following day, viz., 16th of August, voluntarily gave the bond A. to Plaintiff, through his (Plaintiff's) agents, *Siva Rama Chetty* and *Venkatesa Iyen*, the Plaintiff's third and fourth witnesses.

"On the other hand, the Defendant asserts that when he accompanied the Plaintiff and others to *Lekkamani's* palace, on the occasion in question, no accounts at all were examined; that *Lekkamani*, both then and before he gave the note of hand on the 12th idem, assured him that she merely owed Plaintiff a small sum, and that first the note of hand for Rs.62,000, and eventually

the bond A. for Rs.67,000 were obtained from him against his will upon a misrepresentation of facts under the influence of fear, occasioned by the threats employed to induce him to sign them, and without his having had an opportunity of consulting with the collector, as he was anxious to do.

"The conflict in the evidence adduced by the parties to the suit is so appalling, that in weighing it much importance must necessarily attach to the manner and demeanour of the witnesses at the trial; and I may here remark that the clear and straightforward way in which the young zemindar himself gave his testimony left nothing to be desired. He was subjected to a most severe and searching cross-examination, from which he emerged almost scathless; and I am bound here to state that the opinion which I formed, from a very careful study of the witnesses, and from my observation of the case, was eminently favourable to the Defendant's cause, and adverse to that of the Plaintiff.

"It appears, then—

"That on the 23rd of July, 1869, the Defendant was installed as zemindar.

"That on the 28th idem this Court was moved to make him a supplemental Defendant in O.S. No. 30 of 1868.

"That on the 30th idem he was made supplemental Defendant.

"That on the 2nd of August, 1869, he got notice of the same.

"That on the 16th idem the suit was to come on for final hearing, and did so,

"That on the 11th idem the Commissioners reached *Marungapuri*.

"That on the 11th idem the Plaintiff was sent for from *Shevagunga*.

"That on the 14th idem, in the evening, he arrived at *Marungapuri*.

"That on the 12th idem the note of hand for Rs.62,000 was taken from the Defendant.

"That on the 13th idem the razeenamah in O.S. No. 30 of 1868 was signed by *Lekkamani* and present Defendant, and their vakils.

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"That on the 15th idem the Plaintiff asserts that the accounts between the Plaintiff and *Lekkamani* were examined by the agents of *Lekkamani* and the Plaintiff, in the presence of the Defendant.

"That on the 16th idem the bond A for Rs.67,000 was executed, and the razeenamah was put in, in O.S. No. 30 of 1868.

"Now I observe that the note of hand for Rs.62,000 was, as admitted on both sides, given by the Defendant to *Runga Iyengar*; and I think it clearly appears from the testimony of the Defendant's witnesses, that the said *Runga Iyengar* was the Plaintiff's agent; the fact is, however, denied by the Plaintiff and his witnesses, and it is a remarkable fact that the Plaintiff has prudently abstained from placing *Runga Iyengar* in the box, notwithstanding that he cited him as a witness on his behalf. The execution of the note of hand took place on the day after the arrival of the commissioners at *Marangapuri*, and the following are the circumstances under which the Defendant asserts that he was impelled to act as he did:—

"He has stated, on oath, that after the arrival of the said commissioners at *Marungapuri*, *Lekkamani*, the nominal Plaintiff in O. S., No. 30 of 1868, sent for him to her palace, and made overtures to him with a view to having the Suit No. 30 amicably adjusted, by suggesting that she (*Lekkamani*) and the two other widows should have three punnay villages given them for their maintenance, and that he, the Defendant, should further settle the Plaintiff's 'small' account, and he said he would think the matter over: that same day, *Siva Ramah Chetti*, the Plaintiff's third witness, *Coppier*, his fifth witness, *Runga Iyengar*, not examined, and *Venkatesa Iyer*, his fourth witness, asked him for a note of hand for Rs.62,000; he was staggered at the amount of the 'small' account, pleaded in vain for time to consult the collector, the first defendant in the suit, but was eventually terrified into acquiescence by the threats which the said parties held out, that in the event of non-compliance on his part, they would have O. S., No. 30 of 1868, prosecuted as far as the Privy Council, and that even if he (the Defendant) succeeded in retaining the zemindary, 'the Chetty,' meaning the Plaintiff, was so wealthy that he

would assuredly involve the Defendant in such pecuniary difficulties that he would be unable to extricate himself, save by the sale and loss of his fine estate, like the *Shevagunga* and *Chekkamputty* zemindars, and the Defendant's first, second, and third witnesses, *Nalla Tumbi Pellai*, *Navanithakristnam Pillai*, and *Maroothanayagam Pillai*, fully corroborate his statement.

"The Defendant has further deposed on oath, that on the 15th idem, the Plaintiff, *Chedambara Chetty*, presented himself before him at *Marungapuri* (he having been fetched from *Shevagunga*, where he resides), and informed him that his agents had inadvertently taken a note of hand for Rs.62,000 only, whereas the amount ought to have been Rs.67,000, and demanded a bond for that latter amount. He remonstrated, but next day (16th August), on the Plaintiff and the already-mentioned other four individuals threatening him, that unless he gave a bond for the Rs.67,000 demanded, they would get the razeenamah cancelled, the zemindary sold, and an action brought on the note of hand for Rs.62,000 which the Plaintiff held, he, after having pleaded in vain for time to consult the collector, yielded through terror, and eventually executed the bond A. for Rs.67,000, on a stamp for Rs.300, which the Plaintiff himself produced, and the Defendant's statement is fully borne out by first, second, third, and fourth witnesses; of whom the third witness was the writer of, and the fourth witness an attesting witness to, the bond A.

"Now the witness, *Siva Rama Chetty*, seeks to avoid all responsibility in regard to the pressure alleged to have been applied by him to the Defendant, in regard to the note of hand for Rs.62,000, by denying that he was present at all at its execution, and the Plaintiff does the same in regard to the execution of A., for he alleges that he was not present on the occasion. The Plaintiff's witness supports him in that statement; but, on the other hand, the Defendant and his witnesses swear positively that the Plaintiff was present at the execution of A., and that he and his agents employed the threats which induced Defendant to execute the said bond A., on a stamp which the Plaintiff himself furnished, and which was of the value of Rs.300, whereas one for half that amount would have sufficed.

"Now, a very careful consideration of the evidence adduced on

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either side in regard to the disputed points, as to whether or not threats and undue influences and pressure were applied to the Defendant at the time when he first gave the note of hand for Rs.62,000, and subsequently, when he gave the bond A. for Rs.67,000 to Plaintiff in lieu thereof, satisfies me that truth lies with the Defendant and his witnesses.

"I think the evidence in the case leaves me no reasonable room for doubting this fact, as also for being perfectly satisfied that no accoutns were settled before the Defendant gave the bond A. for Rs.67,000. I think there is the strongest ground for believing, from the evidence adduced, and from a consideration of all the surrounding circumstances of the case, that the boy zemindar, fresh from school, inexperienced in the ways of the world, glad perhaps at the prospect of entering peaceably on the enjoyment of his estate, instead of commencing his career with an expensive lawsuit, which might land him he knew not where, was in the first place fraudulently misled by *Lekkamani's* misrepresentation into believing that she had not expended more than what she vaguely designated a 'small' sum in suing the Defendant and the collector in original suit, No. 30 of 1868, that subsequently the Defendant, yielding to fear at the spectacle of ruin and misery which the Plaintiff's agents pictured to him as the inevitable result of his failing to execute the note of hand for Rs.62,000, and without having it in his power to exercise a free choice in the matter, put his hand to the note for Rs.62,000, which sum he was induced by similar threats on the part of the Plaintiff and his satellites to raise to Rs.67,000, for which latter sum he became an involuntary party to the bond A.

"Now, it is not disputed that, as things have turned out, the Defendant has absolutely obtained no advantage or consideration for the bond A., because the razeenamah having been rejected, O. S., No. 30 of 1868, is still being prosecuted by the Plaintiff in *Lekkamani's* name with the utmost assiduity, and it has never been contended that the Defendant himself had obtained any consideration for A. up to the time of its execution.

"In the present suit, it is true, there is no allegation of personal violence having been threatened towards the Defendant in case of his proving obstinate and intractable, but my knowledge of native

character leads me to believe firmly that, assuming the alleged pressure to have been in reality applied, and, judging by the evidence, I have no doubt it was so, it would have proved infinitely more cogent than any threats even of death or personal violence which the Plaintiff or his agents might have applied to the Defendant under the circumstances in which the latter was placed.

"The Defendant was in his own palace, in the midst of his people, who were well affected towards him, and he could assuredly have defied any threat of the Plaintiff to do him a personal injury, but he was aware, as is not disputed, that the Plaintiff had long been mixed up with zemindary intrigues, and notably with that of *Shevagunga*, within whose territory the Plaintiff resides, that he is enormously wealthy, having agents residing, among other places, at *Calcutta, Madras, Ceylon, Modura, Tinnevelly, Ramnad, Shevagunga*, &c., and that the Plaintiff having once embarked in the suit No. 30, of 1868, and advanced money towards its prosecution, would not consent to lose his money until every means had been tried to recover it, and had failed, especially as he already held the Defendant's note of hand for Rs.62,000.

"Now, it is a very remarkable circumstance connected with this case, that not a tittle of documentary evidence has been adduced to shew what money the Plaintiff really advanced to *Lekkamani*, either for the purpose of fomenting litigation or for any other purpose, and I place no reliance on the explanation given by the Plaintiff and his third and fourth witnesses for the omission, and which is to the effect that the accounts were returned to the Defendant after he executed the bond A. This is, I think, with perfect truth, flatly denied by the Defendant and his witnesses, and I can only view, therefore, the Plaintiff withholding such accounts, if in existence, as tending greatly to discredit his cause, besides putting it out of my power to compel him to make good the truth of what he has asserted. I entertain no doubt that the Plaintiff does possess certain accounts relating to his transactions with *Lekkamani*, which he has deliberately withheld because they will not bear the light of scrutiny, and if such be the case, it goes a long way to strengthen the Defendant's assertion that no accounts were settled or even shewn him or his agents prior to his executing the bond A. for Rs.67,000. . . . .

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"I am clearly of opinion, however, that the contract under A. cannot be enforced against the Defendant, because I think there is abundant evidence on the record to shew that the signing of the contract under A. was an involuntary act on the part of the Defendant, who, without having a free choice of saying no in the matter, yielded to the undue influence of extreme terror, occasioned by the threats held out by the Plaintiff and his agents, and I think that he is justly entitled, therefore, to come forward and seek to relieve himself from such contract, and to obtain such relief.

"Throughout the entire course of the transaction, commencing with the demand for the note of hand for Rs.62,000, and culminating in the execution of the bond A., the Defendant is shewn, on what I consider perfectly reliable evidence, to have evinced the strongest desire to consult the collector before taking the momentous step of signing a bond for the stupendous sum of Rs.67,000, and the fact of the Defendant having promptly brought the circumstance to the notice of the collector soon after its occurrence, and claimed protection, materially strengthens, I think, the view I have taken of the case, and the mere fact of the Plaintiff agreeing to accept Rs.12,000 in lieu of the bond B. for a lac, among other things is, I think, not the least of the many symptoms which indirectly serve to indicate the fraudulent nature of the transaction.

"A very careful consideration, then, of the evidence, and of all the material circumstances surrounding the case, leads me to the inevitable conclusion that the Defendant is just such a person as deserves to be specially favoured by the law. He is shewn, I think, to have been helpless to protect his own rights, and he was powerless to contend successfully against what appears to me to have been a combination of fraud, cunning, avarice, and heartlessness arrayed against him, and to which even the strongest mind must have eventually succumbed.

"And inasmuch as I find, on the first issue, that the bond A. wa obtained from the Defendant under undue influence and threats, and, on the second issue, that Defendant has obtained no consideration for the bond A, I dismiss the suit, and direct that the Plaintiff do pay all the costs therein."

Against this judgment and decree the Appellant appealed to

the High Court, which, on the 3rd of June, 1872, pronounced its decree, confirming the decree of the Civil Court, and dismissing the appeal with costs.

The Appellant having obtained leave to appeal to Her Majesty in Council, the appeal now came on to be heard.

Mr. *Kay*, Q.C., and Mr. *J. D. Mayne*, for the Appellant:—

The zemindar was of full age by law, and competent to enter into contracts. The evidence shews that he was in his own house, among his own friends and advisers; that he was well acquainted with the facts; the accounts were examined by his own people. There is a bond for Rs.20,000, and an agreement to pay Rs.100,000 conditionally; it was for the Respondent to point out any errors in the accounts; the pleadings do not challenge the Appellant to produce his accounts. On the 15th of August, the Appellant was justified in considering the Rs.62,000 settled, and that settlement would not be invalidated even if the additional sum of Rs.7000 was not investigated. The Respondent had his own two vakeels to assist him when the razeenamah was signed, and the Commissioner of the Court was present. The Respondent wished to save the widows, and the bond was really given to *Lekkamani*. Forbearance of a disputed claim is consideration, if there be reasonable ground for the claim, or even if the claimant believes his claim to be valid: *Cook* v. *Wright* (1); *Callisher* v. *Bischoffsheim* (2); and the *quantum* is unimportant. Assuming, for the sake of argument, that the Appellant had not a rightful claim against the widows, yet he was preparing to assert what claims he had. Undoubtedly he had advanced Rs.54,000 for maintenance and costs of suit; that sum could have been recovered. The rights of the Appellant as against the widows were defined by documents which they executed freely between themselves. The Appellant, though he kept the widows' bond merely as a security for the fulfilment of the Respondent's obligation, accepted the zemindar as his debtor: that amounts to novation. In amalgamation cases, although in some recent arbitrations there has been a difference of opinion on the subject of novation, yet the Courts

(1) 1 B. & S. 559. (2) Law Rep. 5 Q. B. 449.

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have consistently held the acceptance of a new debtor to be a discharge of the old: *Spencer's Case* (1). As to the alleged undue influence and threats, the Respondent did not tender himself as a witness, but was called by the Judge, and examined after all the others, so that he could not be cross-examined like the rest.

There were no fiduciary relations between the Appellant and the Respondent. There had always been such relations in cases where the Courts have interfered on the ground of undue influence. In *Lyon* v. *Home* (2) it was proved that the Defendant had obtained a power over the Plaintiff's mind which she could not resist. Under the Roman law (*Pothier* on Obligations, p. 18, transl.), it is no threat to assert that one will exercise a legal right; then if the party compromises in order to avoid this, he decides the case himself, instead of leaving it to the Court. The threats, if such they were, were used in the absence of the Appellant. The threat was merely that the Appellant would carry on the suit commenced by the widows, which he thought they had no right to compromise behind his back after receiving advances from him; and that through the suit the Respondent might lose his zemindary. The transaction had been arranged provisionally between the Respondent and the agents of the Appellant before the Appellant was sent for by both parties because its ratification by him was necessary. The agreement between the Appellant and the widows was put an end to. After the razeenamah had been executed, if the Respondent had chosen to abide by it, the Appellant could not have prevented it from being carried out, and there would have been no more litigation. Up to the 27th of May, 1870, the widow pressed the razeenamah. If the consideration for the bond given to the Appellant by the Respondent has failed, it has failed by the act of the Respondent himself in repudiating the razeenamah; and such a failure does not affect the contract, and the person causing it cannot take advantage of it: *Stray* v. *Russell* (3). Up to and on the 31st, the Respondent was desirous to act on the razeenamah, but the Advocate-General, on the part of the Government, objected. The Respondent saw the collector on the 12th, and was still in favour of the razeenamah, with which the bond was connected.

(1) Law Rep. 6 Ch. 362. (2) Law Rep. 6 Eq. 655.
(3) 28 L. J. (Q.B.) 279; 29 L. J. (Ex. Ch.) 115.

He did not take the advice of his English counsel, but had ample advice in his own palace. His conduct shews confirmation without pressure.

The widows thought their claim was fair, but had no resources for carrying on the suit, and did not like to accept maintenance any longer from the zemindar whom they were seeking to dispossess. It was a tripartite independent agreement; each engagement with the zemindar was independent, and the considerations were not dependent upon each other. Even allowing the English law of champerty to be applicable—which we do not admit—still, where a suit is brought to set aside a bond, a Court of Equity always orders the bond to stand as a security for whatever is justly due: *Wood* v. *Wood* (1).

If the whole transaction is to be opened, the Appellant ought to be restored to the position which he held at the time: *Forbes* v. *Overshaw* (2); *Wilson* v. *Coupland* (3); *Israel* v. *Douglas* (4); *Price* v. *Easton* (5). At all events, the Appellant is entitled to the Rs.54,000; and the Court should at least direct an inquiry.

Mr. *Leith*, Q.C., and Mr. *J. B. Norton*, for the Respondent:—

The transaction between the Appellant and the widows was entered into contrary to the *Court of Wards Regulation* of 1804, which forbids lending money to persons under the protection of the Court, and the collector, before the transaction between the widows and the Appellant, had rightly issued orders declaring the bonds of the widows not to be enforceable against the estate.

It is not pretended that there was any adjustment of accounts before the balance of Rs.62,000 was struck, nor is there any evidence that accounts were regularly kept against the widows. The Rs.54,000 is apparently arrived at by adding Rs.20,000, the amount of the bond, to Rs.34,000 alleged to have been advanced. The Appellant himself deposed that he took loan bonds from the widows which amounted to Rs.1000 or Rs.2000. No vouchers were produced. The Respondent denied that any thing was due; and

(1) 18 Ves. 120.
(2) 2 H. & N. 517.
(3) 5 B. & A. 229.
(4) 1 H. Bl. 239.
(5) 4 B. & A. 433.

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this ought to have put the Appellant to prove his account if he could.

Upon a security affected by fraud there can be no relief, even to the extent of advances. The formality of a bond gives no advantage in *India;* consideration must still be proved. The action on the mind of the Respondent was such that he was not a free agent. The agreement was against public policy. The note was taken before the razeenamah was signed.

Champerty is not illegal in *India* unless unconscionable, or against public policy, but the Court views transactions on their own merits, and allows nothing contrary to justice, equity, and good conscience: *Fischer* v. *Kamala Naicker* (1). In a late case in *Bengal* (2), the High Court cited, and followed, a decision of Chief Justice Sir *Barnes Peacock*, in which that learned Judge held that "although he did not mean to say that the law of champerty is a law applicable to the Mofussil, still he thought that the Courts would be exercising a very unsound discretion, and would be acting upon a very erroneous principle, if they would allow a stranger to interfere in family affairs, on an agreement between him and the real heirs that if he could establish their claim he would be entitled to a share of the estate."

The agreement is, on the face of it, against public policy. All were in harmony when the Appellant interfered. There was no proper adviser to assist the Respondent. A vakeel was present, but he appears by the evidence to have been a man who had been dismissed from the public service. Only five months after the original agreement, we find the Appellant getting from the ladies a bond for Rs.20,000, for which he has no receipts or loan bonds to shew; nor are there any vouchers for the Rs.34,000, nor for the Rs.12,000.

There are concurrent judgments of two Courts, finding that there were threats and pressure. There was perturbation of mind, which the Hindu law regards as a cause of nullity. The emancipation of the Respondent had been so recent, that the collector might still be regarded as his proper adviser. There was no novation here, for there was no extinguishment of the claim upon

(1) 8 Moore's Ind. Ap. Ca. 170; see 1 Madras H. C. R. 153.
(2) 13 Suth. W. R. 426.

the widows; and the Respondent retained the instrument, on which he might sue. It was no fair or promising case for the widows. They, in common with the sister of the deceased zemindar, had acknowledged the Respondent as his heir, till the Appellant stirred up this litigation, which he himself conducted without check. *Lyon* v. *Home* (1) shews that a fiduciary relation need not be established to set aside such a transaction: *Earl of Aylesford* v. *Morris* (2).

The evils with which the Respondent was menaced were very formidable. The legitimacy of his birth was attacked, and he was told to be warned by the example of families who had been ruined by resisting the Appellant. Here the advances are alleged to have been made not to the Respondent, whom it is sought to charge, but to a third party, and any money that was advanced was used against the Respondent; consequently there cannot be any claim upon him, even for advances which may have been really made under the agreement. The Appellant has got the documents B. and C., and may enforce them, if valid, against the widows.

Mr. *Kay*, Q.C., in reply.

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At the close of the argument the judgment of their Lordships was delivered by

THE RIGHT HON. SIR JAMES W. COLVILE:—

In this case the Appellant sued the Respondent, who was the zemindar of *Marungapuri*, to recover the amount alleged to be due upon the bond marked A. The material portion of the bond is this:—[His Lordship here stated the material portion of the bond (3)]. The bond and the agreement referred to are Exhibit B. and Exhibit C. Their effect will be afterwards stated.

The Respondent was the younger brother of the late zemindar or poligar of *Marungapuri*. He seems to have been treated as heir presumptive by his brother. Immediately upon his brother's death he was recognised by the authorities as the zemindar; and, being a minor, he and his estate were placed under the guardian-

(1) Law Rep. 6 Eq. 655. (2) Law Rep. 8 Ch. 484.
(3) *Supra*, p. 244.

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ship of the Court of Wards. It is stated in the judgments, and, if the record in the former suit which has been recently before the Court is looked at, it amply appears, that the widows themselves also recognised in the first instance this boy as the heir. And even without going out of the record, it appears upon what is strictly in evidence in this case, that for two years they acquiesced in his recognition by the Government as heir, and received at the hands of the collector, who was exercising the power of the Court of Wards, certain sums by way of maintenance. In December, 1866, a change came over them. The Plaintiff in this suit then came upon the stage, and the agreement which is marked B. was executed on the 21st day of that month. It is an agreement of a very singular nature, and the material portions of it are these:—[His Lordship here stated them (1).] It appears, then, that these ladies having changed their minds, and determined to claim the estate as the heirs of the late zemindar, for that purpose put themselves wholly into the power and into the hands of the Plaintiff; that they agreed to pay him on demand the moneys to be advanced with interest at the rates to be provided for in the bonds which the agreement contemplated they would give the Plaintiff for the advances when made; that they further agreed that if they succeeded in the suit they would pay him a lac of rupees and a moiety of the surplus collections, mortgaging the zemindary to secure those payments; that they would do nothing in the suit, or otherwise, without his consent, and that if they violated the agreement they should at once become liable to pay both the principal and interest due on the loan bonds, and also the lac of rupees and the amount of the surplus collections remaining with the Court of Wards on that day.

Under this stringent agreement, the suit No. 30, of 1868, was instituted in their names; but it is impossible to read the agreement and to know anything of the manner in which litigation is conducted in *India* without seeing that although the suit was carried on in the name of the ladies, the whole management of it was committed to the Plaintiff, and that he was, as was represented in the argument, the real *dominus litis*. It further appears that but one bond was executed by the widows under this agree-

(1) *Supra*, p. 213.

ment, viz., the bond which is dated the 26th of May, 1867, and purports to be a bond for securing the re-payment of the sum of Rs.20,000 (the amount of the Plaintiff's advances up to that time), with interest at 12 per centum per annum. The principal, if not the only, question raised in the suit by the widows was the legitimacy of their husband's younger brother. The family being a joint Hindu family, he, if legitimate, was unquestionably entitled to the zemindary as the heir preferable to the widows. A further question was, however, raised by the collector, who defended the suit as guardian of the minor zemindar, viz., whether the polliem was an hereditary estate at all, or one the succession to which, upon the death of the actual poligar, was determinable by Government. The suit being in that state, the boy, having attained the age of eighteen, which is the age fixed by the Regulations for the majority of a zemindar, was put by the Court of Wards into possession of his estate, and made a formal Defendant; and immediately upon, or very shortly after that, the transactions which are in question in this suit took place. We find the dates given in the judgment of the Judge, Mr. *Davidson*, and there is no doubt about them. The Defendant was installed as zemindar on the 23rd of July; on the 2nd of August, 1869, he had notice that he had been made supplemental Defendant to the suit. The suit was fixed for hearing on the 16th; and on the 11th, in anticipation of that hearing, certain commissioners were sent to *Marungapuri* by the Court, in order to examine the widows, who, of course, were purdah women. The widows seem then to have become desirous of settling and compromising their suit, and the terms upon which they were willing to compromise were finally embodied in a razeenamah. Those terms, however, did not include any subsidiary arrangement to be made in respect of the money which was due from them to the Plaintiff; the razeenamah only expressed that they were willing to consent to the dismissal of their suit upon the terms of their having assigned to them certain villages by way of maintenance, and each party paying his own costs.

As to what took place on the 11th and the subsequent days, there is a considerable conflict of testimony; but their Lordships, adverting to what was said by Mr. *Davidson*, the Judge, as to the

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credit due to the witnesses on either side, and particularly as to the manner in which the zemindar gave his evidence, and to the fact that the finding of the learned Judge has been adopted by the superior Court, have no doubt that it is their duty, upon any matter of fact upon which the testimony is conflicting, to adopt the finding of the zillah Judge. It must, therefore, be taken as found, that on the 12th, when the first negotiation for the compromise took place, there were present on that occasion not only the vakeels and agents of the nominal parties to the suit, but certain persons acting on behalf of, or as agents for, the Appellant; that the latter then contended that the compromise could not be carried into effect without their principal's consent; that a large sum of money was due from the ladies to him; that something was to be paid to him in respect of his interest under the agreement, and that it lay upon the zemindar to make those payments. It must therefore be taken to be found, that although *Lekkamani*, the principal widow, stated that the sum due to the Plaintiff was small, his agents made use of threats to the Respondent to the effect that unless he would make himself liable for moneys to the amount of Rs.62,000, the consent of the Plaintiff to the compromise would be refused; that the case would go on, and would probably terminate in the loss of his zemindary. Their Lordships cannot doubt that such threats were used; that the note for Rs.62,000 was given by the Respondent in consequence of them, and that that note was not given, as it has been once or twice represented in the argument, to *Lekkamani*, or anybody on *Lekkamani's* behalf, but was given to *Rungaiengar*, who was one of the persons acting on behalf of the Plaintiff

The note having been thus given and obtained on the 12th, the razeenamah was signed by *Lekkamani* and the Respondent on the 13th. In the meantime a messenger had been sent from *Marungapuri* to bring the Plaintiff from *Shivagunga*, where he seems to have resided. It is stated that he was sent for on the 11th, but that he did not arrive until the evening of the 14th. On the 15th there was a further transaction; the Appellant asserted that Rs.62,000 was not a sufficient satisfaction of his claims, and that he must have Rs.67,000. As to what then took place there is again a considerable conflict of evidence. It is sworn by him and by

his witnesses that some examination of his accounts was made; that by the account so rendered it appeared that he had actually advanced to the ladies Rs.54,000, although a bond had been taken for only Rs.20,000; that he estimated the compensation to be allowed for the further benefit which, if the suit had been successful, he might have derived under the agreement B., at the sum of Rs.13,000 odd; that the 67,000 rupees were compounded of those two sums, and that the Respondent voluntarily executed the bond A. for that amount. On the other hand, the case made for the Respondent (which is deposed to both by him and his witnesses) is, that there was no rendering of accounts at all; that there was merely a demand for Rs.67,000 instead of the 62,000 rupees; and that the Plaintiff himself then renewed the threats which had been previously made by his agents.

Some, but not all, of the witnesses say that he threatened, if his demand was not acceded to, not only to go on with the pending suit, but also to sue on the note of hand for Rs.62,000. All, however, speak to threats to the effect that he would go on with the suit, that he would carry it through all the Courts up to this board, and that the result to the young zemindar would probably be the loss of his zemindary and the ruin which had fallen upon other zemindars; they also swear that the Respondent in vain asked for time to consult the collector who had so recently been his guardian, and that, under the pressure so put upon him, he was induced to execute the bond for Rs.67,000.

Their Lordships have already said, that when the evidence is conflicting, they must adopt the view which was taken of it by the Judge, Mr. *Davidson*. They must, therefore, hold not only that the Respondent acted under the pressure of the threats deposed to, but, upon the material question whether any accounts were rendered, that there was no accounting at all; that the sum for which the bond was given was an arbitrary sum fixed by the Plaintiff as the amount for which he would be content to allow the arrangement between the widows and the zemindar to be carried out. It may be observed that the bond as drawn out is not altogether consistent with the story told by the Plaintiff himself, since on the face of it the Rs.67,000, would appear to be the balance found to be due in respect of advances for maintenance and for

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costs; whereas upon the statement and admission of the Plaintiff himself, it included the sum of 13,000 and odd rupees, as a compensation for that contingent advantage which he was to derive under the agreement B., in the event of the success of the suit.

It may be well to state what afterwards took place before considering the legal effect of these transactions. On the 16th of August the suit came on for hearing; the razeenamah was then presented, but Mr. *Norton*, who had been counsel for the collector, as guardian of the infant, and who appeared on that day as counsel for the zemindar, now adult, before the razeenamah was filed and acted upon, prayed for an adjournment. That was granted, and on the 31st of August the case came on for final hearing. Mr. *Norton* then, as Advocate-General, acting for the collector alone and not for the zemindar, raised the question which was lately before their Lordships, and was then finally decided; viz., that the estate was not hereditary; that the nomination of the infant zemindar as the next zemindar was an act of state with which the municipal Court had nothing to do; and upon that plea, which must now be taken to be unsustainable, the Judge dismissed the Plaintiff's claim, directing her to pay all the costs. *Lekkamani* then appealed against that decision. No doubt, she might have acquiesced in the title of the zemindar, and they might have privately carried out the arrangements, supposing they were to be carried out, upon which they had previously agreed. However, she saw fit to appeal; but by her appeal she sought only that the decree, instead of being the decree that was made, should be a decree framed in consonance with the razeenamah. In this she did not go beyond her rights. The Respondent appeared upon the appeal by his counsel, and treated the razeenamah as a thing altogether gone, and by which he was no longer bound. The High Court seems to have considered that that was so, and that the razeenamah was to be out of the case. They dealt with the ground upon which the suit had been dismissed, and finally decided, in a very elaborate judgment, which has since been confirmed by Her Majesty in Council, that there was nothing in that ground; that the estate must be taken to be an hereditary estate, and that the succession to it was to be determined by the Civil Courts according to the ordinary law of inheritance. They then gave the widow

time to consider whether she would press her suit, and have the case remanded in order that the issue as to the legitimacy of the Respondent might be regularly tried. The widow elected to have that issue tried. The case was remanded, and the Respondent was found to be legitimate. The widow afterwards appealed against that decision to Her Majesty in Council, and her appeal upon that point was dismissed. Therefore the question of the legitimacy was fought out between the parties to the bitter end.

Now upon the transactions which took place between the 11th and the 16th of August, several questions have been raised. The issues settled in this suit were in effect whether there was any consideration for the bond; and whether the bond had been obtained by such undue pressure and threats as were sufficient to vitiate the contract.

And the principal questions which have been argued at the Bar are, first, whether there was sufficient consideration for the bond; next, whether, if there were, there had not been a failure of that consideration; and thirdly, whether the plea impeaching the bond on the ground of pressure and threats, could be supported.

Upon the first point their Lordships will assume, at all events for the sake of argument, that if the transaction had been between parties dealing with each other at arms' length, and unaffected by any of the circumstances on which the third plea is founded, there would have been a sufficient legal consideration to support the bond.

Assuming, however, that there was a real substantial debt due to the Appellant from the women on an agreement to which no objection could have been taken; that there was a *bonâ fide* arrangement by which the widows were to have their suit dismissed; and that one term of that arrangement was that they should be relieved of the debt due to the Plaintiff,—their Lordships must observe that they agree with the Judges of the High Court in holding that the transaction would hardly amount to what is called a "novation." It was not a transaction by which the widows were altogether released from the debt which they had incurred to the Plaintiff, nor was the Plaintiff's position altered by reason of his having lost his remedy against them. It appears upon the face of the bond that he was to retain his securities

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against them until the bond was satisfied; and that the contract on his part was, in fact, rather an agreement to abandon his remedy against them on the payment of the Rs.67,000, than an actual abandonment at the time of the transaction.

The question which has been raised as to the failure of consideration, if it were necessary to determine it, might present some difficulty. It is quite clear that the Respondent never got the benefit of that for which he stipulated; that circumstances prevented the razeenamah from being acted upon, and that in the events which afterwards took place he was exposed to have his title questioned and carried up to the Court of ultimate appeal, just in the same way as it would have been litigated had the razeenamah never been executed. On the other hand, there is, no doubt, a good deal of truth in the argument of Mr. *Mayne*, to the effect that the failure of consideration was in some degree due to the Respondent himself; and that if, when the widow had appealed from the first decision in her suit, and claimed the benefit of the razeenamah, he had joined in also asking for the benefit of the razeenamah, the whole transaction might have been carried out as the parties had originally intended it should be. It is, however, unnecessary to decide this question, since it appears to their Lordships that the Respondent is entitled to succeed on the other issue settled in this suit.

What was really the position of the parties? Here was a man who had originally nothing at all to do with this family. All the members of the family appear at first to have been agreed that this young boy was the true heir to the zemindary. The widows afterwards, then, either of their own mere motion, or at the instigation of the Plaintiff or his agents, determined to dispute that title. They next deprived themselves of all freedom of action with respect to the suit which they thought fit to bring, by giving the interest and the powers which are given by the agreement B. to the Plaintiff.

With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty, being part of the statute law of *England*, has of course no effect in the mofussil of *India*; and the Courts of *India*

do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts in *England*. On the other hand, the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. Now, looking at all the facts of this case, their Lordships think it is extremely doubtful whether the Plaintiff could have recovered on this agreement if the question had arisen between the widows and the Plaintiff after he had got the estate for them; whether, upon the principles laid down by Chief Justice *Peacock* and cited by Mr. Justice *Kemp* in this case in the 13th Weekly Reporter (1), the Courts might not have refused to enforce such an agreement. The principle laid down by the learned Judge was that although the law of champerty was not a law applicable to the Mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of the estate. Nor, in holding that such an agreement could not be enforced, would the Courts, as it seems to their Lordships, be running counter to what was decided by this Committee in the case of *Fischer* v. *Kamala Naicker*; for the judgment there assumes that if the agreement is something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, it cannot be supported. But it is not necessary for their Lordships to decide a question which has not arisen, viz., what would have been the rights of the Appellant as against the widow. It is sufficient for them to say that they are dealing with a person who had got up, or at all events inter-

(1) 13 Suth. W. R. 426.

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vened, in a suit with which he had no necessary concern; who had made himself *dominus litis* in that suit, and had acquired over the Plaintiffs in it the power of preventing them from doing what they felt to be right and just; and from interested and corrupt motives was exercising that power. The zemindar must be taken to have been the legitimate heir; and even if the widows had *bonâ fide* entered into the litigation to dispute that legitimacy, it is perfectly clear that at the time when this transaction took place they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain zemindar.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit, and a power which cannot be safely conceded to any speculator,—to make his power of preventing a family arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged. The case, however, does not rest here. The transaction was not one entered into between two persons, each of whom was capable of taking care of himself. Here was a boy of eighteen without proper counsel or assistance, for such of his servants as gave him any advice thought with him, that he should do nothing until he could see the collector; and his vakeel, who is represented as his legal adviser in the matter, disowns having given him any counsel, and has been treated as having failed in his duty in refusing that counsel. There is, moreover, clear evidence that he was threatened with the consequences of not immediately acquiescing in the Plaintiff's demand; that these threats were addressed by a powerful man to a boy, and were therefore likely to disturb his mind and render him incapable of acting as a free agent. Whoever has had to do with litigation in *India* must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the Respondent was called in question; and the person threatening was a person conversant with law-suits,—a person of great wealth and great power; and we all know how easy it is in *India*, upon such an issue as that, to get

up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal; for (putting aside the threat as to suing on the note for Rs.62,000, which is not so satisfactorily proved as the others) they think that the threats proved may well be taken to be threats of carrying on the litigation against the Respondent *per fas aut nefas*. In any case they were threats which overcame his free will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

That being their Lordships' view, they think that the Court below was right in holding that the bond cannot stand against the Respondent. It is not necessary to go into the question which has been argued on both sides as to the power of the Court to make the bond stand as a security for what may really have been advanced. It is not necessary to consider whether in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of Justice ought to exercise the power of saying that such a deed shall stand as security for what is really due; because in this case, but for the bond which was thus extorted from him, nothing was ever due from the Respondent to the Appellant, and there existed no privity of contract between them.

Upon these grounds their Lordships think that the decisions of the Courts below, now under appeal, were right, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal, with costs.

Solicitors for the Appellant: *Jones, Blaxland, & Son.*
Solicitors for the Respondent: *Gregory, Rowcliffes, & Rawle.*

J. C.* 1873 Nov. 25, 26. 1874 Jan. 7, 14, 15, 16; March 15.

OOLAGAPPA CHETTY . . . . . APPELLANT;

AND

1. HON. D. ARBUTHNOT, COLLECTOR AND AGENT TO THE COURT OF WARDS ON BEHALF OF THE MINOR SON OF GANDAMA RAMA KRISHNAMA NAIKER, ZEMINDAR OF GUNDAMANAIKANOOR; 2. KANTIMATINADA PILLAI, MANAGER OF THE SAID ESTATE; 3. MUTHUVENKATADRI NAIKER, ZEMINDAR OF EDIACOTTAI AND GUARDIAN OF THE SAID MINOR; 4. VALUNDI AMMAL, NATURAL GUARDIAN AND THE MOTHER OF THE SAID WARD . . . . . RESPONDENTS.

On Appeal from the High Court of Judicature at Madras.

An unsettled polliem in the *Madras* Presidency may be hereditary; whether it is so, must be ascertained by evidence in each case. Proof of possession or receipt of rent by a person who pays the land revenue to Government is *primâ facie* evidence of an estate of inheritance (1).

Where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main question of fact necessary to be decided, and a party may have been prevented from adducing evidence, a fresh issue may be directed to try the principal question of fact.

The first issue raised in the lower Court was, whether a zemindary or the income thereof was answerable for the debt of the late zemindar.

Their Lordships granted an issue to try whether the late zemindar had an estate of inheritance in the zemindary which descended to his minor son as his heir.

Terms on which such issue will be granted.

THIS was an appeal from a decree of the High Court of Judicature at *Madras*, bearing date the 13th of May, 1870, which

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, THE RIGHT HON. SIR ROBERT P. COLLIER, and THE RIGHT HON. SIR LAWRENCE PEEL.

(1) See the head-note to the next case; *infra*, p. 282.

partly reversed and partly confirmed a decree of the Civil Judge of *Madura*, bearing date the 14th of April, 1869.

The suit in which the appeal arose was brought by the Appellant against the Respondents to recover the sum of Rs.39,678. 11*a*. 11*p*., being principal and interest due under a razinamah executed by the late Zemindar of *Gundamanaikañoor*.

The zemindary of *Gundamanaikanoor* is an ancient estate in the district of *Madura*, in respect of which no sunnud under Reg. XXV. of 1802 had been granted to the zemindar.

The late zemindar appears to have come into possession of his estate somewhere about the year 1837, being then a minor.

During his tenure of the estate disputes arose between the late zemindar and his ryots, which resulted in a litigation spreading over eight or nine years, during which the rents were not collected. In consequence, the Government peshcush fell into arrear, and the collector issued an order directing the attachment of the zemindary. For the purpose of discharging these arrears, and also of making the necessary repairs of dams, the late zemindar borrowed money from several persons; including the Plaintiff, and finally paid off all his other debtors by a loan contracted with the Plaintiff.

In 1863 there was due on this account from the late zemindar to the Plaintiff the sum of Rs.29,788. 11*a*. 9*p*., for which he instituted a suit in the Civil Court of *Madura*. That suit was terminated by a razinamah, dated the 26th of April, 1864, which provided that the late zemindar should pay to the Plaintiff the sum of Rs.32,259. 2*a*. 5*p*., being the amount of debt, costs, and interest, by five annual instalments, and that, in default of even a single instalment, the Plaintiff, without reference to the other instalments, should, after deducting what was paid up to that period, get the balance with interest realised by a warrant and Court precept issued against the Defendants' zemindary. It was finally prayed by the razinamah that a decree might be passed according to the terms of the razinamah.

On the 8th of December, 1865, an application for execution of this razinamah was made to the Civil Court of *Madura*. This application was refused, owing to a recent decision of the High Court, which laid down that razinamahs could not be carried into

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effect by the Courts. The Plaintiff, in 1866, brought a suit against the late zemindar on the razinamah, which was discontinued on account of the zemindar's death; and the Court directed him to bring a fresh suit after the heirs of the deceased were nominated.

He accordingly filed his plaint in the Civil Court of *Madura* on the 24th of February, 1868, against the collector of the Court of Wards, on behalf of the minor son of the late zemindar (who was nominated his father's heir), the manager of the estate, and the guardian and the mother of the minor.

On the 20th of November the collector filed his written statement in answer. "The first Defendant," he stated, "begs to submit, in the first instance, that the estate of *Gundamanaikanoor* is an unsettled polliem, for which no permanent sunnud has been granted. A sunnud milkeut istimirar (grant of proprietory possession in perpetuity) is necessary to constitute a zemindary hereditary property, according to the decree passed by the late Sudder Court in appeal suit No. 11 of 1816, as in their decree book, No. 1. The first Defendant further begs to submit, that in accordance with the decree passed by the late Sudder Court in appeal suit No. 14 of 1817, as in book No. 1, the appointment of a successor to the said zemindary entirely depends upon the will and pleasure of the ruling power; and the Government, in the exercise of this prerogative, have appointed the minor son of the deceased poligar as his successor.

"And that the minor poligar, who succeeded to the zemindary, not on any hereditary right, but on the will and pleasure of the Government, and the late poligar and the zemindary, in which he had only a life interest, are not liable, under the rulings of the late Sudder Court, referred to in the preceding paragraph, for the whole or any portion of the amount of the razinamah, which is said to have been executed by the said deceased poligar."

The contention of the Plaintiff, as set out by the Civil Judge, was "in effect that the revenues and *corpus* are equally answerable; that the succession to the zemindary has continued from father to son in one family; and that, even in the absence of a sunnud, there is nothing in the descent of this particular property to exclude it from the operation of the general rule of Hindu law as applicable to inherited property in general."

On the 20th of November, 1868, the Civil Judge held a proceeding in which the following issues were settled in the suit:—

1. Whether or not the zemindary, or the income thereof, is answerable for the debt.

2. Whether the minor is in any way answerable.

The Plaintiff produced both documentary and oral evidence in the case, directed chiefly to shewing the existence, origin, and *bona fides* of the debt contracted by the late zemindar with the Appellant.

The first Defendant, the collector, also produced evidence of both kinds.

The documentary evidence consisted of six official records, and was directed exclusively to establish that the zemindary of *Gundamanaikanoor* was an unsettled zemindary, not held under a sunnud.

The oral evidence was directed to establish the small amount of moveable property attached on the death of the late zemindar.

The Civil Judge of *Madura* delivered his judgment in the cause on the 14th of April, 1869.

The most material parts of the judgment are as follows:—

"The evidence adduced in this suit is conclusive in shewing: 1st. That the sum which Plaintiff seeks to recover is founded on a *bonâ fide* debt incurred by the late Zemindar of *Gundamanaikanoor;* and, 2ndly. That the zemindary itself is what is called an unsettled polliem, that is to say, an estate held without a sunnud, which, under the terms of Reg. XXV. of 1802, is necessary in order to constitute it hereditary property (1).

"The issues framed embrace two distinct questions: 1st. Whether under these circumstances the zemindary or the income thereof are answerable for the debts of the former zemindar; and, 2ndly. Whether there is any other property which the present minor zemindar has inherited from his father upon which the Plaintiff can proceed in order to recover the sum he now sues for. . . .

"In appeal suit, No. 11 of 1816 (vol. i., p. 141, Sudder Decisions) it was held that a sunnud was necessary to constitute a zemindary hereditary property; and in appeal suit, No. 14 of

(1) The various passages of the Regulations which relate to this subject are stated, *infra*, p. 305, in the judgment in *Lekkamani's Case*.

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1817 (p. 173), the rule was upheld, the Judges remarking that 'succession to zemindaree tenures was not governed exclusively by the laws of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures as might be considered most expedient for the purpose of realising the public revenue due from the lands.' It may be doubted, however, that in these days such views would be acted upon. Later on, in regular appeal, No. 9 of 1867 (page 303, vol. iii., High Court Reports) the same principle is maintained, Mr. Justice *Holloway* observing that there is not a continuance of the previous estate in each successive holder, but a fresh estate created by the gift.

"Whether or no the revenues of the zemindary are answerable must, I think, depend mainly upon the character of the debt itself and the urgency of the late zemindar's requirements, but it is not without great diffidence that I have come to this conclusion. In the case just quoted there is a passage which tends to shew that this point has not yet been finally settled. After remarking that the Defendant could not be liable to the extent of the polliem, Mr. Justice *Holloway* adds, 'Whether its income would, in the hands of the son, be bound or not, it is not now necessary to consider.' In a case differing materially in its facts, but from which principles applicable to the present suit are deducible (*Moore's* Indian Appeals, vol. vi. p. 341), I gather that, notwithstanding the peculiarity of the law relating to those zemindaries, circumstances might exist which would render the holder of the estate responsible for the debts of his father, and that the freedom from the obligation depends more on the nature of the debt than on the nature of the estate itself; and this principle was, to a certain extent, recognised in High Court Regular Appeal, No. 59 of 1866, but in every case the *onus* of proving the unexceptional character of the debt is declared to rest with the creditor."

The Judge then remarked that the debt had been contracted for a necessary purpose, in order to prevent the sale of the zemindary for arrears of peshcush, which might have affected the interests of the heir very unfavourably. The Judge, therefore, on the ground that the estate had been preserved intact by the loan, decided that the Plaintiff was entitled to recover the sum sued for from the income of the zemindary.

The collector appealed to the High Court of *Madras* on the grounds that the revenues of an unsettled polliem are not liable, in the hands of the holder for the time being, for the debts of a previous holder of the estate, for whatever purpose contracted; and that, if liable at all, such revenues are only liable for debts contracted for the benefit of the estate, and the Plaintiff had not proved that the debts the subject of the suit were of that nature.

At the time when the appeal was filed, there was a current of decisions in the late Sudder Court of *Madras*, and in the High Court, which supported the view taken by the Civil Court in the judgment above quoted. At the hearing of the appeal no serious attempt was made to controvert that ruling.

On the 30th of May, 1870, the Judges of the High Court delivered the following judgment:—

"THE CHIEF JUSTICE:—This is a suit to enforce the payment of a debt due by the late possessor of the polliem of *Gundamanaikanoor* by the guardians of his minor son, and the Lower Court has found that the debt was incurred for money lent to pay off arrears of peshcush, for which the polliem was about to be attached, and for reproductive work done upon the land, and has decreed the liability of the Defendants to pay the sum claimed from the revenues of the polliem, as well as from the private property of the late poligar, inherited by the minor.

"The ground of appeal relied upon by the Defendants is, that so much of the decree as adjudges payment of the debt out of the revenues of the polliem is wrong, the polliem not being an estate of inheritance, but an estate which had been held by the minor's father and the possessors of it who preceded him, for life only, under grants made to them severally by the Government. This objection, I am of opinion, must prevail.

"It has long been considered an established rule of Hindu law in this Presidency, that an heir is not liable to be sued for the debts of the person whose heir he is, except assets have come to his hands,—that is, he has acquired property by succession from the deceased debtor, and then only to the extent of such assets. Now clearly, as respects the polliem, the Defendant is not in that position. On the determination of the estate of his father by his death, the proprietary right to the polliem reverted absolutely to

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the Government, and by their fresh grant to the Defendant a newly created estate for life became vested in him. In this respect the present case differs from the cases of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo*, and the *Collector of Madura* v. *Veeracamoo Ummal*, cited in argument from 9 *Moore's* Indian Appeals, pp. 66 and 446. They were cases of disputed titles to polliems which were, it appears, hereditary. The Defendant, therefore, is not liable as the personal representative of his father by reason of his possession of the polliem.

"So far the learned Counsel for the Respondent hardly contested seriously the non-liability of the Defendants (the Appellants). His main argument was, that by the Plaintiff's loan the polliem had been saved from confiscation, and the grant of it secured to the minor, and that afforded an equitable ground for making the liability in the present case an exception to the general rule.

"It does not appear to me that the necessary effect of enforcing the attachment would have been to deprive the minor of a grant from the Government; but even assuming that such would have been its effect, I can see no grounds of equity upon which to rest the Plaintiff's claim, which is, in effect, to treat the debt as a charge upon the minor's estate. The Plaintiff simply made the late zemindar his sole debtor for advances to enable him to protect his life interest by paying off the charge for arrears of peshcush. They stood, in short, in the relative positions of ordinary simple contract creditor and debtor. . . . .

"For these reasons I am of opinion that the decree of the Lower Court must be reversed so far as it declares the liability of the Defendants in respect of the revenue of the polliem. In other respects the decree will stand affirmed. I think the Appellants' costs should be paid by the Respondent."

"The only question is," said Mr. Justice *Holloway*, "whether the revenues of a polliem, not hereditary, can be held liable for the debts of the previous holder.

"The ground upon which it is sought to bind them is that the debts were incurred for the release of the estate from attachment. If this had been proved, and the present holder had taken the estate through the borrower, there would be no doubt of the liability, and the reason would be that the successor takes both the

rights and liabilities of him under whom he claims, and must discharge the latter to the extent of the assets taken. It is unnecessary here to advert to any exceptions. The reason why this rule does not apply to the successor to a polliem is that, as pointed out in 3 *Madras* H. C. Rep. 303, there is no continuance of the previous estate; the present holder does not succeed. . . .

"What the advance of money preserved, if indeed it preserved anything, was the estate of the then holder. It had and could have no connection with an estate which had not then and might never have existence, since it wholly depended on the will of others. . . . .

"The rule of law perfectly well established here is, that a man must discharge the liabilities of him under whom he claims, to the extent of the assets taken. It follows that the assets so taken are the only fund upon which the creditor has a claim, and the nature of the estate taken shews that its object matter is not assets, and for the simple reason that it was not taken from or through the debtor. I have no doubt that the decree of the Lower Court must be reversed so far as it seeks to fasten the debt upon the income of the polliem."

No appeal was preferred against this decree within the six months allowed for an appeal to Her Majesty in Council. But, on the 26th of April, 1871, the High Court of *Madras* heard and decided an appeal in a case in which one *Lekkamani Ammal* was the Appellant, and the Respondents were the Collector of *Trichinopoly* and the present zemindar of *Marungapuri* (the case which forms the subject of the next Report (1)).

As the decision in the last-named case overruled the doctrine upon which the suit of *Oolagappa Chetty* v. *Arbuthnot and Others* had been decided adversely to the Appellant, and as the time for appeal to Her Majesty in Council had expired, the Appellant applied for special leave to appeal to Her said Majesty in Council; stating, amongst other things, that the title to numerous estates in the Presidency of *Madras* depended upon the question whether unsettled polliems were held only for life, or for an estate of inheritance, and that it was for the public interest that such question should be determined by a final decision.

(1) *Infra*, p. 282.

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Her Majesty, by Order in Council, bearing date the 5th of February, 1872, accordingly directed and ordered that the Appellant should be allowed to enter and prosecute his appeal.

The appeal now came on to be heard.

Mr. *Field*, Q.C., and Mr. *J. D. Mayne*, for the Appellant:—

The history of the poligars is to be found in the Manual of the *Madura* District, compiled from official sources by Mr. *Nelson*, by order of the *Madras* Government; and in the Regulations of 1802 and 1822. It appears that excessive assessment produced rebellion, and that the Government afterwards contemplated a permanent settlement of the rent to be exacted from each poligar; but some of the polliems were treated as only temporarily settled, and some were assumed for a time, in order to ascertain what they would yield.

In the meantime a poligar in possession of his polliem, even if the assessment has not been permanently settled, can exercise almost every power which a proprietor in *England* could exercise. He lets land to ryots, receives rent, pays peshcush to Government, and has, as it were, the fee simple; and the Government may resume the land if he does not pay. On his death his son gets the land. He appears to be the owner, the Government shews no intention to interfere with his assessment, and credit is given to him as proprietor. In the present case the Appellant lent money to the late zemindar for purposes beneficial to him and to the estate; the family does not contest it; it is only the collector, as guardian of the minor, who disputes the claim; it was admitted that this was a reasonable charge if the estate was liable to the debts of the ancestor. There is no evidence of the nomination of the holders of this polliem by the Government, or of any interference on its part. The Hindu family is a continuous institution; but with family enjoyment you find family obligations. Even where an estate is held as a raj by a single member of an undivided family, those who are joint with him in family are entitled to maintenance. Where the Government leaves a polliem in the possession of one family from generation to generation, this gives the poligar credit, and enables him to obtain advances. The razinamah is in the nature of a charge on the polliem, and was made upon good consideration. Among

the Hindus, *primâ facie*, all property is hereditary. Even the humblest village offices have a strong tendency to become hereditary. All property, being hereditary, is liable in the son's hands for the debts of the father. The liability for debts is not only legal, but religious. Sir *Thomas Strange*, Hindu Law, vol. i., p. 166, states, as the two grounds on which a man takes property, the duty of performing the obsequies, and that of discharging the debts: and in this respect he makes no distinction between personal and real property, ancestral and acquired. In the case of *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) the Court says that the liability depends on the character of the debt, and not on that of the estate. The principle of the adverse decisions was an alleged universal rule, that no unsettled polliem could be hereditary; and therefore, if it be shewn that one unsettled polliem was hereditary, the principle fails.

It appears from several *Madras* cases that unsettled polliems might be hereditary. *Madras* Dec. 1857, p. 51; *Madras* Dec. 1860, p. 72; *Collector of Madura* v. *Veeracamoo Ummal* (2).

The collector gave no evidence of the actual history of the devolution of the zemindary. The proposition on which the Court went was general, that no unsettled polliem could be hereditary. We submit that some unsettled polliems may be hereditary and some not. There being a current of decisions that unsettled polliems were not hereditary, that point was not contested in the Court below; but it was not admitted that any evidence applying to this polliem in particular, shewed it not to be hereditary, and we are not excluded from contending here that there is no general rule that an unsettled polliem cannot be hereditary.

Supposing there were no evidence on either side, we say that polliems must be taken *primâ facie* to be hereditary, though there are instances the other way. Even if a sunnud had been given, it would not be conclusive against us (3). It is common to take a new sunnud on descent even where the tenure is hereditary. The allegation that this property is not of a hereditary character rests on arguments from Reg. XXV. of 1802, which was explained by

(1) 6 Moore's Ind. Ap. Ca. 421. (2) 9 Moore's Ind. App. Ca. 446.
(3) 14 Moore's Ind. Ap. Ca. 247.

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Reg. IV. of 1822. The decisions of the Sudder Court also rely on Reg. XXV. of 1802. Acts of the native Government in turning out, do not shew that the Government had right, only that it had power.

Bengal Reg. 1793, preamble, recites the practice of Asiatic Governments. There is a difference between the *Bengal* and *Madras* preambles; but it is a mistake to suppose that the *Madras* Regulations recognise no proprietary right, except that which rests on a permanent settlement. There is no ground for holding that the estate of the zemindar is that of a tenant for life. If not hereditary, he would be only at will—a squatter. In the west of *India*, large tracts are held by Nairs and others, without any sunnud, where the estates descend according to their own law. This interpretation of the Regulation only applies to those who have got sunnuds. It takes away no rights. Reg. IV., 1822, means that the Regulation is not to affect any class of property except as to the people who are to receive sunnuds; leaving all others as before.

If we suppose Reg. XXV. of 1802 had never been passed, and we go back to the old law, we find the property to be in the cultivators, Government having a right to a share.

In early Hindu society, there was no intermediate between the sovereign and the cultivator. Under Mahomedan law there were intermediates. Some Hindu tribes remained imperfectly conquered, and their chiefs retained greater power than elsewhere. This appears from the Fifth Report of the Select Committee of the House of Commons on the affairs of *India* (1812), and from the *Madura* Manual. The list of names in the Manual, pp. 10-12, shews that the polliems were held by Hindus. Sir *Thomas Munro's* account, in the Appendix to the Fifth Report, of the poligars of other districts, shews that their estates descended from father to son. The Government has treated them all as proprietors, has assumed the land when the rent was in arrear, and handed it back eventually. It has paid pensions to the ousted zemindars, and accepted the surrender of the property from them when they thought the burden of the rent too great. The permanent settlement was intended for all; but the *Madras* Government found it difficult to determine the annual demand in each case (1).

(1) Pages 98-100, Part iv. Madura Manual, extra. Proc. of Board, 1815.

In the official correspondence, they speak of the poligar paying his arrears on his restoration; but they still use language shewing they considered the property his. The reports divide the lands into Government lands, where the Government is absolute owner and makes its bargain with the ryots; and polliems, in which Government takes the tribute, not claiming property. In a recent case from *Ganjam*, of an unsettled polliem, it was laid down that a sunnud is only intended to fix the amount of the revenue, not to recognise the title of the possessor of the land. The rights as between zemindar and ryot are the same, whether there is a sunnud or not.

The razinamah was given for good consideration, and the Court ought to have declared in the terms of the razinamah. It is the practice of the Mofussil Courts to carry such agreements into effect.

In the case of the *Collector of Madura* v. *Veeracamoo Ummal* (1), the Government sued for possession by escheat for want of male heirs of a polliem not held under *Istimrari Surund*, alleging that females were not competent to succeed to a polliem, though it had itself installed females as heirs; but the Privy Council sustained the decree of the Sudder Dewanny at *Madras*, which decided that a female was entitled to succeed as heir. No doubt the Sudder Court refused on that occasion to listen to the plea that the Government was entitled to appoint at will to such a polliem on the death of the incumbent, merely because the point had not been taken in the Court below; but it would certainly have been taken in the Court below if it had been a sound argument. It was singular to sue for an escheat if the estate was not hereditary.

The early Madras cases were decided without argument, and upon less information than the Courts now possess. The case of *Naragunty Lutchmeedavama* v. *Vengama Naidoo* (2), shews that an unsettled polliem may be hereditary. But the Government in that case would not select, but gave leave to the Applicant to sue as heir, and left it to the Court to say who was heir. This is fatal to the argument that polliems are not hereditary; for if Government had a right to appoint, it would have appointed. In the present case it was for the Defendant, the collector, to prove his

(1) 9 Moore's Ind. Ap. Ca. 446 (2) 9 Moore's Ind. Ap. Ca. 66.

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assertion that the polliem went by the appointment of Government.

Mr. *Forsyth*, Q.C., and Mr. *H. C. Merivale*, for the first Respondent:—

The history of the polliems shews that the Government treated the poligars not purely as landowners, but changed, assumed, restored, and dealt with their estates in various ways. The poligar was originally an officer and not a proprietor, and the language of the *Madras* Regulations shews that he was only to acquire proprietary rights on receiving a sunnud after the Government had made a settlement of revenue with him in perpetuity. It is for the Appellants to shew that the estate was hereditary, and they have adduced no proof of it. No doubt the Government has usually appointed the heir upon a vacancy, and people seeing father followed by son, think the property must be hereditary, just as the eldest son of the Sovereign is popularly supposed to be Prince of *Wales* by right of birth, though, in fact, he is always created Prince of *Wales*.

Though the succession continued in the same family, it is not right, in the absence of all evidence, to presume that the tenure was hereditary. The report of the case of *Lekkamani* v. *Zemindar of Marungapuri* (1) shews that the Judges thought that there was a great variety of tenures. In some cases, owing to the remissness of Government, no appointments were made by the Government. In others, nominations were made by the Government, always choosing in the family, and generally the eldest son. Probably they merely appointed without giving a sunnud on the occasion. In this case the zemindar contracted a debt and the creditor sued him; and upon his death his son was not made party, but a fresh proceeding was instituted, treating the son as a stranger. The order of Court required that heirs should be nominated, which implies that they required nomination. The son required no nomination to constitute him heir-at-law, though he was not entitled to the polliem without nomination.

In the *Marungapuri* case the Court examined the evidence adduced to shew that the Government appointed. Where property

(1) 6 H. C. Mad. 226.

in anything is predicated—as it is said in the Regulations that the Government has the proprietary right—it must be assumed to be absolute until the contrary is proved; and the fact that the heir was usually appointed does not take away the right of Government. This is a very peculiar property; it had its origin before the days of the British Government, but we acknowledged it.

It is not denied that, by special grant of Government, a polliem may be hereditary. In the *Naragunty Case* (1), Government had granted a polliem to a man and his heirs, and the question was who was his heir. In that very case it appears that in 1866 the only surviving representative of the eldest branch of the family was nominated by the Governor of *Madras* in exercise of his prerogative. If the son takes, not as heir but under the appointment, this property cannot be answerable for the father's debt.

It was assumed in the Court below that the general law was, according to repeated decisions of the *Madras* Court, that polliems for which no sunnud had been given were not hereditary, but subject to appointment by Government; hence no evidence was offered to shew that this polliem had gone by appointment. If this is not held to be the general law, the case ought to be remitted to the *Madras* Courts for the purpose of taking evidence on the subject.

It was then mentioned to their Lordships that an appeal from the High Court of Madras in the *Marungapuri* case was coming on for hearing at an early date, and it was ordered, by consent of the Counsel on both sides, that the further argument of the present case should stand over till the *Marungapuri* case was before the Committee.

(1) 9 Moore's Ind. Ap. Ca. 66.

J. C.* 1874 *Jan.* 14, 15, 16; *March* 13.

THE COLLECTOR OF TRICHINOPOLY (AS REPRESENTING THE INTEREST OF THE GOVERNOR OF FORT ST. GEORGE) . . . } APPELLANT;

AND

LEKKAMANI (FIRST WIDOW OF THE LATE ZEMINDAR) SINCE DECEASED, AND THE ZEMINDAR OF MARUNGAPURI . . . RESPONDENTS.

PEDDA AMANI AND CHINNA AMANI (SECOND AND THIRD WIDOWS OF THE LATE ZEMINDAR) . . . . . } APPELLANTS;

AND

THE ZEMINDAR OF MARUNGAPURI . RESPONDENT.

On Appeal from the High Court of Judicature at Madras.

The affirmative words of the 2nd section of *Madras* Reg. XXV. of 1802 did not either give new rights to the owners of lands not permanently assessed or take away from them any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them.

The words "proprietors of land," as used both in the *Bengal Code* of 1793, and in the *Madras Code* of 1802, refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of *Madras* Reg. XXV. of 1802, must also be read in a similar sense as meaning the possession and rights of a "proprietor" in the technical sense in which that word is used, viz., the person who pays the revenue immediately to Government.

The preamble of *Madras* Reg. XXV. of 1802 recognises the right of private property, and does not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The object of the *Madras* Reg. XXXI. of 1802 was only the protection of the revenue from invalid lakiraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon

* *Present*:—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, and THE RIGHT HON. SIR ROBERT P. COLLIER.

Government any title which did not then exist. The words "alienations of land" refer not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue.

A polliem may be hereditary though not permanently settled under Reg. XXV. of 1802; and the existence of a proprietary estate in polliems or other lands not permanently assessed, and the tenure by which it has been held, are judicially determinable on legal evidence.

The polliem of *Marungapuri* is an ancestral hereditary tenure, and not subject to the appointment of Government.

In *India*, the proof of possession or of receipt of rent by a person who pays the land revenue immediately to Government is *primâ facie* evidence of an estate of inheritance in the case of an ordinary zemindary. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir. There is no difference in this respect between a polliem and an ordinary zemindary. The only difference between a polliem or zemindary which is permanently settled and one that is not is that, in the former the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have that power.

A child, born in wedlock, of a Hindu husband and wife, is not rendered illegitimate by the circumstance that he was begotten before their marriage.

THE suit which gave rise to this appeal was brought in the Civil Court of *Trichinopoly*, by *Lekkamani*, the first widow of *Terumalai Puchaya Naiker*, the late zemindar of *Marungapuri*, to recover, as his heiress, amongst other things, the villages attached to the zemindary. The suit was brought against the Collector of *Trichinopoly*, as the agent of the Court of Wards in charge of the zemindary, on behalf, and as the guardian, of *Renga Kishna Muthu Vira Puchaiya Naickar*, a minor, who was the half-brother of the deceased zemindar, and who, after his death, had been recognised by the Government as the zemindar. At the time of the late zemindar's death, he and his half-brother, the minor, were members of an undivided family, and, consequently, if the estate was hereditary, and the minor was legitimate, he was the heir of the deceased zemindar (1).

The principal defences set up by the collector were—

1. That no istimrari sunnud (2) had been granted for the zemindary, and that it was an unsettled polliem; that after the death of the late zemindar the right to nominate a successor to him was vested in the Government; that the Government had granted the zemindary to the minor *Renga Kishna;* and that this, being an act of state, could not be questioned by any Municipal Court.

(1) 9 Moore's Ind. App. Ca. 66.

(2) See *supra*, p. 270.

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2. That, even if an istimrari sunnud had been granted, and the polliem had been settled, the minor, as the undivided half-brother of the deceased zemindar, would be the rightful heir thereto.

The widow disputed the legitimacy of the minor, and the following were the principal issues laid down for trial :—

1. Whether the Court was competent to entertain the suit.

2. Whether the half-brother of the deceased zemindar was his legal heir, or whether the Plaintiff herself was entitled to succeed to the zemindary.

3. Whether the minor was the half-brother of the deceased zemindar.

Subsequently, the minor, having attained his full age, was admitted as a supplemental Defendant in the suit; but the first Defendant, the collector, was also allowed to be heard in defence. Whereupon the first Defendant, the collector, having been examined as a witness, the Judge held that it was conclusively proved that the zemindary was an unsettled polliem, and that the right of succession having been declared by the highest authority to be vested in Government and not in the line of lineal succession, it followed that that right could not be called in question in that Court. He, therefore, found the first issue in favour of the first Defendant, and dismissed the Plaintiff's suit with costs.

The Plaintiff appealed to the High Court, and made only the second or supplemental Defendant, the half brother, Respondent. Whereupon the collector presented a petition to the High Court stating that it was contended on the part of the Appellant that the zemindary was not an unsettled one, and consequently that the Government had no right to interfere with the succession thereto on the death of the zemindar, and that the Government was interested in the decision of that question ; he therefore prayed that he might be made a party to the suit, and allowed on behalf of Government to defend the appeal.

On the 17th of June, 1870, the petition of the collector was dismissed.

Another petition to the same effect was subsequently presented by the collector, the Government offering to forego all claim to costs. Whereupon it was ordered that the application should be admitted on condition that, in the event of the appeal being dis-

missed with costs, no more than the costs of one Respondent should be allowed against the Appellant.

Thus the collector, who was originally a Defendant merely as agent of the Court of Wards and as guardian of the minor zemindar *Renga Kishna*, became substantially a party to the suit on behalf of and as representing the interests of Government. The appeal came on to be heard before the High Court who, at the close of the arguments on the first day of the hearing, were of opinion, for the reasons specified in their judgment, that upon the case presented by the record returned to the Court the decree of the Zillah Court could not stand, and they adjourned the further hearing of the appeal; afterwards, having obtained all the evidence which the parties were able to adduce with respect to the proprietary right of the late zemindar, and having heard the case fully argued, they delivered judgment.

In the first place, they held that the Government proceedings admitting the minor to the succession did not amount to an act of state, which debarred the cognizance of the suit by a municipal Court.

The correctness of their decision upon that point was not disputed in the appeal to the Privy Council.

They then proceeded to consider the question whether the estate of the late zemindar was hereditary, or whether he had merely an estate for life. They held that the polliem was an ancestral hereditary estate.

They said in their judgment—

"With respect to the proprietary right possessed by the late zemindar, there is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him an hereditary estate, which passed on his death to his heir in the order of legal succession, as the Plaintiff contends, or an estate for life, on the termination of which the right to dispose of the property reverted to the Government as the Defendants contend. The villages and lands mentioned in the plaint form one of the *Manapuri* polliems, but the estate and the holder of it have been commonly given the designations used in the plaint, of zemindary and zemindar; it is, however, a conceded fact that no istimrari sunnud granting the estate under Reg. XXV. of 1802 has ever existed; and the positions advanced on both sides, stated summarily, are on behalf of the Plaintiff, that there is sufficient evidence from which to draw the inference that the property had been permanently assessed; but, if not, that the tenure by which the polliems not permanently assessed are held had not attached to it as

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an essential incident the limit of the life of the holder, but that, both historically and by judicial authority, the tenure is rather shewn to be in its nature hereditary or for life, according to the nature of the grant creating it, and that in the present case the evidence proved the polliem to have been held as an hereditary estate."

Then, after reviewing the authorities, the evidence, and the arguments of counsel, they proceeded—

"Upon the whole, we are of opinion that it has been established as strongly as a claim of this nature can be expected to be proved, that the polliem in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost everything tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a sunnud under Reg. XXV. of 1802; and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue in the suit, whether the second Defendant is the legitimate brother of the late poligar, *Terumalai Puchaya Naiker*. If so, he is the rightful heir to all the property claimed in the plaint, no division having taken place between him and his deceased brother. But if illegitimate, he has no right to any portion of it. No additional issue is necessary."

An issue was then directed to try whether the half-brother was legitimate or not.

This issue was found by the Zillah Judge in favour of the half-brother, and his decision was confirmed, on appeal, by the High Court of *Madras*, and the suit of the widow was dismissed with costs.

The Collector of *Trichinopoly*, as representing the interest of the Governor of *Fort St. George* in Council, appealed against so much of the judgment of the High Court, dated 26th of April, 1871, as decided that the succession to the polliem, the subject of the suit in particular, and to unsettled zemindaries or polliems in general, is a matter cognizable by the Civil Courts, and not dependent on the will of the ruling power, and that an istimrari sunnud is not necessary to constitute such zemindaries or polliems hereditary estates. The original Plaintiff having died, two junior widows of the late zemindar named *Pedda Amani* and *Chinna Amani* obtained leave to appeal to Her Majesty in Council against the decree whereby *Lekkamani's* suit was dismissed with costs, and an order having been afterwards passed that the two appeals should be consolidated, and be heard upon one printed case on each side, they now came on to be heard.

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Mr. *Forsyth*, Q.C., Mr. *Macpherson*, and Mr. *J. B. Norton*,

appeared for the Appellant and the second Respondent in the first appeal, and the Respondent in the second appeal.

Mr. *J. D. Mayne*, and Mr. *F. C. J. Millar*, appeared for the first Respondent in the first appeal, and the Appellants in the second appeal.

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The appeal of *Oolagappa Chetty* v. *Arbuthnot*, in which the same point of law as to the polliem tenure was involved as in the appeal of the Collector of *Trichinopoly*, and which had for that reason been ordered to stand over until the hearing of the last-named appeal (1), was also placed in the paper.

The appeal in the case of *Pedda Amani* and *Chinna Amani* against the zemindar of *Marungapuri*, which involved the question of the legitimacy of the half-brother of the deceased zemindar, was, by direction of their Lordships, first heard.

The facts of the case sufficiently appear from the judgment.

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Mr. *J. D. Mayne*, and Mr. *F. C. J. Millar*, for the Appellants. The following authorities were cited:—

Manu, ch. vi., ss. 35–37; ch. ix., §§ 8, 158–161, 173, 180; *Mit.* Ch. I., s. 11, §§ 1, 2, 8, 19 [Ed. *Stokes*], p. 410; 3 Dig. pp. 156, 173, 224, 271; *Smriti Chandrika*, ch. x., §§ 1–5, 12, pp. 151, 156; *Madhaviya*, §§ 27, 32, pp. 20, 24; *Mayukha*, ch. iv., s. 4, §§ 41–46 [Ed. *Stokes*], p. 57: *Datt. Miman.*, S. I. §§ 33, 35, 64; *Datt. Chand.* S. I. §§ 8, 9 [Ed. *Stokes*], p. 630; *Norton*, L. C., pt. ii. p. 495.

At the close of the argument for the Appellant, their Lordships, without calling upon the Counsel for the Respondent, proceeded to pass judgment, which was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

Their Lordships are of opinion that there is no ground for interfering with the decision of the High Court of *Madras* upon the issue of legitimacy. They think there is sufficient evidence that the second Defendant was the legitimate brother of the deceased

(1) *Supra*, p. 281.

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poligar. There is some express evidence as to the marriage having taken place, and there is no doubt whatever that the lady, the mother of the second Defendant, was taken to the palace of his father for the purpose of being married. It may be taken as a fact that the marriage was interrupted, but there is evidence from which it may be presumed that, notwithstanding that interruption, a marriage did take place between the father and mother of the second Defendant prior to his birth.

In the document put in by the Defendant, which is called a deposition, but which appears to be more in the nature of a petition or urzee, as it is called, made by the deceased zemindar, the half-brother of the Defendant, on the 15th of May, 1854, shortly after the death of their father, he says: "Ere this I have reported to the talook, as also to the huzur, the circumstances of the death of my father, *Muthoovera Puchaya Naiker*, which occurred on the 25th of April of this year. Of the six wives married by my father, the first, *Ahkamani*, being issueless, and I being the son of the second wife, and eldest son, my father, while alive, in the presence of all the people, invested me with the pattam, according to the right of succession in our family, and the custom prevailing among our caste, and delivered to me all the insignia of the pattam, consisting of weapons, &c. I pray, therefore, that the sanction of the Government may be obtained, declaring me entitled to the said zemindary." Then he says:—"From the genealogical tree now presented to the Sircar, shewing the particulars of the descendants of the said zemindars from the time of the settlement, and which bears the signature of myself and others, the names and descendants of my ancestors, and other particulars can be ascertained." In the genealogical tree which accompanied that document the lady, the mother of the second Defendant, is described as the fifth wife of his father. The first wife of his father is *Akamani*, and then comes *Appamani* as the fifth wife—that is the mother of the present second Defendant—and then the present second Defendant himself is mentioned as her son, "*Renga Kishna Muthu Vira Puchaiya Naickar*, three years old." If it be taken as a fact that the boy was then three years old, that would make his birth about May or June, 1851, to which date we shall have presently to allude.

In addition to the last-mentioned document there is a petition

of the late zemindar, dated the 21st of January, 1862. He there says: "My deceased father, who was the late zemindar, has left but two sons, viz., myself and my younger brother." Then he says in another part: "The said *Ovalappanayakan* is the son of the whore *Kantimate*, and is a tenant under me in *Marungapuri*." Therefore he puts the second Defendant in that document as his brother and *Ovalappana* as a bastard. This is a document in which he requested the Court "that the statement made by the said *Ovalappana* to the effect that he is the son of my father may be set aside, and that the petition presented to the same effect may also be rejected." Therefore he treats the second Defendant in this suit as being his brother in a petition in which he wished to have the statement of another person that he was his brother set aside. Then there is a document, No. 13, made by the late poligar, in which he says: "As I am suffering much from a boil on my back, and as I do not expect to live long, I have, according to the custom of our caste, caused my younger step-brother (meaning half-brother) *Renga Kishna Muthu Vira Puchaiya Naickar*, aged fifteen years, to be invested with the pattam, there being no son to me, and appointed my cousin *Meilaramain* a manager, to continue till the boy shall come of age to manage the affairs of the zemindary according to usage. I pray, therefore, that your honour will on this ground be pleased to consider my said younger brother as myself, and treat him with the same amount of kindness as you have shewed me hitherto." Then there is a document, which is a petition signed by the present Plaintiff, in which she declares the second Defendant in this suit to be the present zemindar and the younger brother of the deceased zemindar. Further, there is a very important document, a statement made by the three widows of the late zemindar, in which they say that the second Defendant, "whom we now wish to get invested with the pattam, is the son of *Kammamani*, the legally married wife of our father-in-law." The said "*Kammamani* is now alive; the said ammal (lady) also lives jointly with us." Is it likely that the wives would have allowed the lady to live with them if she had not been married?

The next document is an official report of the tehsildar to the acting Collector of *Trichinopoly*, dated the 27th of July, 1864.

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He says: "I have received the Order No. 108, directing me to inquire into and report upon certain circumstances relating to the demise of *Terumalai Puchaya Naiker*, zemindar of *Marungapuri*, attached to this talook. In obedience to the said order I proceeded to *Marungapuri* immediately, and, in the presence of *Kristna Row*, the sub-magistrate of that division, caused the three widows of the deceased zemindar to remain behind the screen, and caused also a confidential woman to see them, and took down the statement given by them, and having received their signatures and those of the witnesses therein, I have enclosed the said statement herein." So that this statement, in which they say that the lady was the legally married wife of their father-in-law, was taken in the presence, not only of the attesting witnesses, but also of the sub-magistrate and tehsildar.

Now, it is said that the document signed by the late zemindar just before his death, and the document which was signed by the three widows, of whom one is the Plaintiff, was obtained through the instrumentality of the cousin, who is said to have been appointed as the agent of the second Defendant. But there is no evidence whatever given in the cause to shew that the deceased zemindar was imposed upon by the cousin, or that any undue influence was exercised over him to get him to make that statement, nor is there any evidence to shew that the statement which he made was not made with the full understanding of what he was then stating.

In the second paragraph of the plaint the Plaintiff, the eldest widow, says:—"On the day preceding his death,"—that is, the death of the late zemindar,—"he made an arrangement constituting me as his heir to the said zemindary, and directing that the two junior widows, named *Pedda Amani* and *Chinna Amani*, should remain under my protection; that *Terumalai Puchaya Naiker*, a cousin of the deceased, should, on my behalf and under my orders, have the management; and that after my death the said widows should enjoy the estate successively." No document to that effect has been proved, nor has any evidence been given of the truth of the statement. Then, in the fifth paragraph it is stated:—"On making proper inquiries I ascertained that during the time I and the others were sunk in sorrow on account of our husband's death,

Terumalai Puchaya Naiker, the cousin aforesaid, who I believed was managing the affairs of the zemindary on my behalf, according to my husband's directions, had, in collusion with *Kedara Moodely Navanitha Krishnama Pillay*, at a time when my other servants in the palace were under his control, concealed my husband's arrangements, and the real urzee he (husband) addressed to the collector; that he had represented to the collector, the tahsildar, and others, that my late husband installed as zemindar the minor,"—that is, the second Defendant—"who has no connection whatever with the zemindary, and that he, my husband, had addressed an urzee to the collector, appointing him, the cousin, as manager for the said minor; and that he had conducted certain proceedings by which the zemindary has been placed under the management of the Court of Wards on behalf of the said minor." Now, there is no proof whatever of that allegation. We have, therefore, the admission of the late zemindar that the second Defendant was his brother, and we have also the admission of the Plaintiff, and the other widows of the deceased zemindar, that the second Defendant was the son of the lawfully married wife of his father.

Now then, what evidence has been given to disprove that fact? It is said that the marriage was to have taken place in the month of Avani. The lady, it is proved, was carried to the palace for the purpose of being married, and she has given her own evidence in the case, and has sworn to the fact of a marriage having taken place. There is no evidence whatever to shew that her parents ever complained that she had not been married, or that she was detained in the palace by the deceased poligar against her will, or that he had taken her there under pretence of marrying her and had then refused to do so. No evidence of that sort has been given, and if the case were true that he had not married the lady, one would expect that some evidence would have been given to shew that the father and mother of the lady had complained of the manner in which their daughter had been treated, and that they had been deceived in allowing her to go to the palace, under the pretence that she was to be married.

It is said that the Defendant's evidence is disproved by the fact of some of the witnesses of the Plaintiff shewing that no marriage did take place, and also by the evidence of the Defendant's

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witnesses in which they state that the marriage took place in the month of Avani. Great reliance is placed upon the witness who is stated to be the priest of the family. But although he is now the priest, and states that he is the priest, he was not the priest at the time when this marriage took place. He could only have been eighteen years of age at that time. He gave his evidence in the year 1871, and he then stated he was thirty-eight years of age. That would make him about eighteen at this time, and he says that the marriage was celebrated in the month of Avani of 1850. Now, their Lordships do not think that the marriage did take place at that time, but the witness was speaking merely from memory, and the fact of his stating that it was in the month of Avani does not necessarily prove that the marriage did not take place at any other time. The next witness says that the marriage took place only on the day fixed in the first instance, but this witness, who was not the priest of the family, but merely a cultivator, gives evidence that the marriage did take place, and he says it took place only on the day fixed in the first instance. If he is supposed not to have made a mistake, but to have wilfully stated that the marriage actually took place on the day originally fixed, for the purpose of making the child appear to be legitimate, and to have stated that falsely, then he may be disbelieved altogether; but you are not to take his evidence, and say that because he states that the marriage took place only on the day fixed in the first instance, when it is proved by other evidence that it did not take place on that day, that he has proved that the marriage did not take place at all in the face of the admission and conduct of the Plaintiff and of the other widows, and of the statement of the deceased poligar, that the Defendant was his legitimate half-brother. Their Lordships are of opinion that there is sufficient evidence of the legitimacy, and that there is no sufficient evidence on the other side to rebut it or to shew that a marriage did not take place, or that a marriage having taken place, it took place after the birth of the child.

That being so, their Lordships think that the High Court came to a correct conclusion that a marriage did take place between the father and mother of the child prior to its birth; and, assuming that the High Court are correct in finding that the

child, although born after marriage, was procreated or begotten before the marriage took place, their Lordships are of opinion that that Court came to a right conclusion, in point of law, that the child was legitimate.

The point of illegitimacy being established by proof that the procreation was before marriage had never suggested itself even to the learned Counsel for the Appellant at the time of the trial, nor does it appear, from the authorities cited, to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law, that law must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of opinion that the Hindu law is the same in that respect as the English law.

Under these circumstances, their Lordships are of opinion that the High Court came to a correct conclusion in finding that the Defendant had made out that he was the legitimate half-brother of the deceased poligar; and that, being members of an undivided family, the polliem descended to him.

That disposes of the cause; for, if the Defendant is the heir of the deceased poligar, the widow can have no claim. The decree of the High Court was correct, and her suit must be dismissed.

Their Lordships will, therefore, humbly recommend Her Majesty that the judgment of the High Court be affirmed, and the widow's appeal dismissed with costs.

The question of law on the Collector's appeal, which applied almost equally to the appeal in the case of *Oolagappa Chetty* v. *Arbuthnot*, turned upon the history of the polliem tenures and the legislation which had taken place with regard to them. The view which the Judges of the High Court of *Madras* took of the general results of the decided cases and of the voluminous evidence in the cause, will appear by the following extracts from their judgment, against which the collector's appeal was brought (1).

"The combined effect of the judgments in all the cases does

(1) 6 Mad. H. C. Rep. 208.

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not, it appears to us, amount to any deliberate adjudication as to the polliem tenure being of a definite nature, but does go the length of giving the weight of judicial acceptance to its being legally either hereditary or for life, according to the express or implied grant established in each case.

"The authority of judicial decision cannot therefore be held to preclude the contentions on either side as to the estate held by the late zemindar; but we think it throws on the Defendants the burden of sustaining their contention, that his estate, from the very nature of the tenure, was limited."

"The name 'poligar' appears to have been applied before the Maharatta invasion to persons holding in the southern and western portions of the *Madras* Presidency the position of those who had acquired the name of zemindar in the northern districts. And substantially the history of the two classes is similar. Originally the descendants of officers of police and revenue agents of Hindu sovereigns, they advanced themselves to the positions of chiefs, maintaining military forces, and possessing fortresses and strongholds. As such they were employed by Mussulman rulers in upholding subjection to their government and managing the collection of revenue. And although (as remarked by Mr. *Mountstuart Elphinstone* in his 'History of *India*') it seems doubtful whether they were more than chiefs enjoying some degree of independence before the time of *Aurangazib*, yet in later times, by embracing the frequent opportunities for refractoriness and the extension of their power afforded by the weakness and inefficiency of the ruling power, they reached to the independence of tributory feudatories and proprietary holders of land, and that position they or their descendants were in general permitted to enjoy hereditarily down to the establishment of British Government. That permission, however, cannot be pronounced to have amounted to a positive recognition establishing their assumed rights generally (except, perhaps, as respects a few who traced heirship through a long descent from rajahs or officers who had received villages in inam), because of their not unfrequently having been deprived of their rights. But it can hardly be doubted that it was decisive and extensive enough to give strong claims to such a recognition. Indeed, the Company's officers

appeared to have at first regarded them as already possessing established titles as landed proprietors; and although that view was after a time modified, nothing was done indicating any doubts as to the strength of the claims of both zemindars and poligars to be secured in such titles, or any wish in opposition to a compliance with such claims.

"Among the first acts of the Company's government were the reinstatement of some poligars who had been driven out of their polliems, and the confirmation of the others (save a few who continued rebellious) in the enjoyment of their estates, upon the conditions of rendering to the Government their tribute and services (which were soon after converted into an increased jumma or rent adjusted according to the productive value of the lands), and of the regular letting of their lands to ryots for cultivation; and when subsequently disturbances were caused by the poligars of some districts, the Government, in the course which was deliberately decided upon and pursued, treated them as insubordinate landowners who exercised powers incompatible with the position of subjects and paid an insufficient jumma. They were coerced to surrender all their civil and military administrative powers, and had their jumma increased to a new temporary assessment to an amount which left them more of the returns from the land than was consistent with any other position than that of proprietors, When, again, on the recurrence, after such assessment, of rebellious conduct on the part of some poligars in the *Tinnevelly* district, their polliems were taken from them; some of the lands were added to the holdings of other deserving poligars. Other polliems, too, that were given up to the Government because of the discontent of the holders with the new assessment, in order that their actual productive qualities might be known, were, upon the proper rates of jumma being fixed, returned (with the exception of one or two sequestered on special grounds) to the former holders, and in one or two instances at least to the heir of a former holder. All these occurrences appear to have taken place before the close of the last century, and the only change since made has been the bringing of some polliems under the permanent settlement, and the assessing of the others on the principle of the permanent settlement; and that all were not brought under the

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permanent settlement was, there can be little doubt, owing solely to the need for that cautious experience which the board of directors urged on the *Madras* Government in 1804 and subsequent years, in consequence of the reasons and objections of the Government against an irrevocable settlement, founded upon grounds of state policy. On the nature and effect of these settlements we shall have to observe when we allude presently to the proceedings of the Board of Revenue of the 14th of January, 1813.

"This review of the salient points of the history of polliems, found in the report of the Select Committee (1), confirms the impression derivable from the reported cases, in which titles of polliems have been contested; and we think that it is sufficiently apparent that polliems, before the passing of Reg. XXV. of 1802, had been acknowledged to be what they have since been dealt with as—proprietary estates held under the Government by either a hereditary tenure or a life tenure. Now, applying this result to the Regulation, we have next to consider whether, in regard to polliems not permanently settled, it has the effect of declaring positively a different view; namely, as to the past, that private proprietary estates were not existent before; and as to the future, that they would exist only when created hereditarily by a sunnadi-milkiut-i-istimrar, upon a permanent assessment being fixed under the Regulation." . . . .

"For these reasons we are of opinion that the zemindars and poligars, and others in a like position, and occupying tenants, possessed different proprietary rights in land, by recognition of the Government, before the passing of Reg. XXV. of 1802; that by it the Government declared with the force of law their acknowledgment and confirmation of such rights, as they were then enjoyed; and in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government, and for the issuing thereupon of express hereditary grants to every zemindar and other intermediate proprietor, and written engagements between them and their tenants; and therefore that the Regulation does not operate to exclude or disfavour the main-

(1) Fifth Report of Select Committee, 1812.

tenance of a claim against the Government to a hereditary or other estate in lands, which has not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments; but that claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an istimrari sunnud. It could never, we think, have been intended that the Government, by delaying to do in regard to some estates what the Regulation enacts should be done in regard to all lands, for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. It follows that the existence of a proprietary estate in polliems or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.

"We are thus brought to consider the evidence laid before the Court, and on this point the conclusion contended for on the part of the Respondents is, not that the Government have the absolute right to deprive the family of the polliem on the death of each holder of it, but that they have the right to appoint whom they please of the kindred of the deceased poligar to be his successor. In effect, that the members of the family have taken successive life estates by express concession of the Government." . . . .

"The legitimate conclusions deducible from all that is stated in those proceedings, and the other documents above referred to, we consider to be these:—The Government appear to have always dealt with the *Manapuri* polliems as ancestral estates, passing by succession in the families of the holders. They have never retained any of the polliems, except on an escheat for failure of heirs, or a voluntary surrender in consideration of a malikana allowance, or when polliems were resumed for the purpose of being kept under management temporarily, until redeemed by the payment off of arrears of peshkush (which occurred once as respects the polliem now in dispute), instead of attempting to sell the estate, or enforcing payment against the persons of the poligars owing the arrears, or their property generally. And although these *Manapura* polliems have never been permanently settled under Reg. XXV.

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of 1802, they have been continued for more than half a century before the institution of the suit, under an assessment equivalent to that fixed on zemindaries permanently settled under that Regulation, and made with the intention of its becoming permanently fixed by the grant of sunnuds:—in effect, have practically been permanently settled ancestral estates in the estimation of the Government from the time of Mr. *Parish's* assessments. In support of the latter conclusion we have the additional circumstance that the polliems are described as "permanently settled" in the statement of revenue account from Fusly 1275 to 1278, furnished by two collectors and in the letter of a third collector, addressed to the Board of Revenue. The Advocate-General argued that that description was shewn to be a mistake by the letters of another collector in exhibits 14 and 5, correcting the statement in the latter communication; and no doubt the correction was right, if the statement was understood to mean permanently settled under Reg. XXV. of 1802, which we may consider to have probably been the case when we find that the description was continued for two years after the date of the letters of correction. This argument, therefore, does not remove the force which we give to the description. Further, we have yet stronger proof of the conclusion in the fact that so recently as 1866 it was determined by the Revenue Board that a sunnud should be offered to the late poligar when he came of full age.

"We have next to consider the force of the direct evidence relied upon as shewing that the Government have exercised a control over the course of succession. The Revenue Board, in their proceedings of the 14th of January, 1863, par. 25, assert the right to nominate as successor on the occasion of a death a person who had no claim to it according to the general law of succession. And if that has been established, the Plaintiff is not entitled to the polliem, although a family estate. The earliest succession of which there is any particular evidence took place in 1811 or 1812, and the succession of the late poligar in 1854 was the next. The former was denied on the part of the Respondents, but nothing was suggested to cast a doubt on the fact appearing from the certified copy of the record in Original Suit, No. 49, in the register of the Southern Provincial Court, that, in consequence of a death in 1811 or 1812, the right to the succession was litigated in that

suit, and determined in 1813 by a decree in favour of the Defendant as the heir of his father, who had inherited from his grandfather. We cannot, therefore, doubt the fact of a succession at that date; and there is not the least evidence to shew that control was then exercised by the Government, but an inference to the contrary may be drawn from the fact that there was no mention of any control in the suit. Besides, it is highly probable that if any had been exercised, some evidence of it would have been forthcoming from the Government records. Consequently we must take it that the Government had exercised no further control than we have already alluded to (which does not appear to have touched the right of succession) at the date of the death of the late zemindar's predecessor in 1854.

"The evidence relating to the succession of the late zemindar are the letters of the sub-collector to the collector and the proceedings of the Board of Revenue, and the Government order thereon. In his first letter the sub-collector reported the death of the zemindar, and his having recognised his son as heir; and that, on receipt of further communication from the tashildar, he would submit his opinion on the right of the son to the succession. In his second letter he gave a statement of the family of the deceased, shewing that the heir recognised by the zemindar was his eldest son, and recommended that he should be recognised and invested as poligar. The collector then forwarded a similar recommendation to the Board, who submitted it to the Government, recommending that, as the person named was the eldest son, and to be presumed capable of managing the property, he should be recognised as proprietor in succession to his father; and thereupon the Government passed an order recognising the eldest son as poligar in succession to his deceased father, and his right to be placed in possession of the estate.

"What took place when the late zemindar died, on the 17th of July, 1864, appears from the collector's letter to the Court of Wards reporting the death, the proceedings of the Court, and the Government order thereon. The collector's report mentioned the surviving relations, and the receipt of a petition from the zemindar just before his death, asking the recognition of his minor brother as his successor, and his cousin as manager during his minority;

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that he had inquired, and ascertained it to be the wishes of the widows that their deceased husband's desire should be complied with, subject to the first widow having a control over the management. The Government, adopting the opinion expressed in the proceedings of the Court, ordered that as the brother appeared to be the legal heir he should be recognised, and the estate taken charge of by the collector as agent of the Court, and that the collector should report further as to the management.

"These are all the acts and circumstances advanced to prove that the right of succession was conditional upon the will of the Government."

Mr. *Forsyth*, Q.C., and Mr. *J. B. Norton*, for the Appellant, the collector of *Trichinopoly*:—

There is a material difference between the *Bengal* and *Madras* Regulations, that relate to the settlement of the land revenue. According to the former, "By the ancient law of the country the ruling power is entitled to a certain proportion of the produce of every beegah of land": *Beng.* Reg. XIX. of 1793; while according to the latter, "the ruling power of the provinces now subject to the Government of *Fort St. George* has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description:" *Mad.* Reg. XXXI. of 1802. Consequently, under the *Bengal* Regulations, it was only "grants of land to be held exempt from the payment of revenue" that "were to be considered void as alienations of the dues of Government without its consent:" *Beng.* Reg. XIX. of 1793, s. 1; while under the *Madras* Regulations, "all alienations of land except by the consent of the ruling power, were held to be violations of its right:" *Mad.* Reg. XXXI. of 1802, s. 1. In *Bengal* it was only necessary to declare that the settlement was to be concluded "with the actual proprietors of the soil, of whatever denomination, whether zemindars, talookdars, or chowdhries:" *Beng.* Reg. VIII. of 1793, s. 4. In *Madras*, it was also requisite to grant to zemindars and other landholders, a sunnud, or deed of permanent property, where the condition of the permanent assessment of the revenue may have been adjusted: *Mad.* Reg. XXV. of 1802, ss. 1, 3. In *Bengal*, the Government having recognised the persons with whom they were about to make a settlement of

the revenue, as being already the proprietors of the land, a provision was made with regard to "proprietors who may finally decline to engage for the jummah proposed to them" that they "are to receive a malikaneh (an allowance in consideration of their proprietary right) at the rate of 10 per cent. on the Sudder jummah of their lands:" Reg. VIII. of 1793, s. 44. There is no such provision in the corresponding *Madras* Regulations, because the parties with whom the settlement was to be made were to become proprietors only in consequence of the settlement.

In *Bengal* it was necessary to make some provision for cases where the proprietary right might have been transferred before the settlement. Accordingly, rules were given for ascertaining the parties who were or were not entitled to make a settlement with the Government apart from the zemindars, and in the event of disputes the question was left to be determined by the ordinary Courts of Justice. A like course seems to have been followed in the settlements of revenue in the *North-Western Provinces*, and more recently in *Oudh*, where the title of the parties with whom the settlement should be made is matter of judicial inquiry in case of dispute. In *Madras* there are no such provisions. The Government, being still the proprietor, has a right to select the parties with whom the settlement is to be made.

It is hardly conceivable that the *Madras* Government could have intended by two Regulations passed in the same year to lay down inconsistent doctrines on the same subject, declaring by one, *Mad.* Reg. XXXI. of 1802, that the ruling power "had reserved to itself and exercised the actual proprietary right of lands of every description," and by the other affirming existing proprietary rights in zemindars, and poligars, and others:" *Mad.* Reg. XXV. of 1802; and then proceed to indicate a mode of constituting such rights in them *de novo*.

Reg. IV. of 1822 was expressly intended only to regulate the interpretation of Regs. XXV., XXVIII., and XXX. of 1802, relating to landlord and tenant (1). Giving the utmost latitude to the expressions of Act IV. of 1822, it leaves untouched the 1st section of Reg. XXXI. of 1802. The Government was not a party to, and is not bound by, the case of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (2), in which it was assumed between the parties

(1) See 3 Mad. H. C. Rep. p. 18.

(2) 9 Moore's Ind. App. Ca. 66.

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that the estate was hereditary; but yet the parties did not sue in the ordinary way, but obtained the permission of the Government first.

In the case of the *Collector of Madura* v. *Veeracamoo Ummal* (1), the Government opposed the succession on the ground that females were not entitled to succeed, but on its being proved that the Government had itself appointed females, the Government, at the last moment, fell back on its right to appoint to an unsettled estate, and the Court said the Government was too late in raising that plea, but the point was not argued and decided. It is admitted that no sunnud was ever granted in respect of this polliem, and although the amount of revenue exacted has continued the same since 1804, yet it has never been permanently settled, and it has been shewn by the documents put in evidence that it has not been so regarded; nor is it contended that the revenue might not be increased. It was for the Defendants to prove that the property was hereditary; and the fact of the son coming after the father does not prove that he came simply by right of inheritance. The two last poligars appear, when dying, to have addressed the collector, and begged his protection for the heir. The succession to this polliem was no doubt litigated, and a decision pronounced in the Civil Court in the suit of 1813, but all that the Court decided was that a certain party had not proved his adoption, and the Government was no party to the suit.

Mr. *J. D. Mayne*, for the first Respondent in the case of the *Collector of Trichinopoly* v. *Lekkamani*, and also, in reply, for the Appellant in the case of *Oolagappa Chetty* v. *Arbuthnot*:—

The preamble of Reg. XXXI. has no bearing on the case. We have not a sunnud under Reg. XXV. of 1802, nor do we assert that we hold rent-free, as contemplated by Reg. XXXI. If the words of the preamble were taken literally, they would sweep away every kind of proprietary right throughout the Presidency of *Madras*, and would make every kind of alienation impossible. From what source could the Government have derived such powers? In the *Carnatic*, as in *Bengal*, they have always based their rights on treaty, not on conquest. They never were proprietors, except as the ultimate paramount lords — proprietors,

(1) 9 Moore's Ind. App. Ca. 447.

indeed, but only in a sense consistent with other persons having power to buy, sell, or charge. It is said that the Mahomedan law asserts the fullest right in the Government as conqueror to the whole soil, and that the Mahomedan Government made over the right to the British Government. Under the Mahomedan law (Hedaya, vol. ii., p. 204, 205, 208, of tithe or tribute), it was lawful to take the whole from infidels; but the practice was never adopted by the Moguls. This appears by the account given in *Elphinstone's* History of *India*, of the legislation of the Emperor *Akbar*. By the Hindu law: *Menu*, ch. 9, par. 44; ch. 7, par. 130; ch. 8, par. 39; the king was not owner, but had a right to a share of the produce. These intermediate tenures never existed under Hindu law. Hindu officers of the Mahomedan Government gradually hardened into proprietors. It is unreasonable to represent the Government as actual legal proprietor. Both in the eastern, and in the western, and in the central part of the Presidency there are proprietary tenures inconsistent with the interpretation which is sought to be put upon the preambles of Reg. XXV. and XXXI. of 1802, such as the *Nair* tenures and successions of *Malabar*, and those of *Canara*. Many of them are mentioned in the 5th Report, already cited. For instance, the ryots, who under various names had rights of occupancy and alienation subject to the payment of rent, were never interfered with by any Hindu or Mahomedan Government. This interpretation of the preambles being wrong as to great part of the other tenures of the Presidency, is wrong as to the polliems also.

The poligars being subjected to severe taxation rebelled, and their estates were forfeited, or escheated for want of heirs, or taken by the Government for a time and restored on the arrears being satisfied. This appears by the Instructions to the Board of Revenue, issued the 4th of September, 1799, which are to be found in the 18th Appendix to the Fifth Report of 1812. It was found that the system of arbitrary assessment was not successful with the zemindars, and therefore a permanent settlement was recommended. It was with reference to the interest of the revenue only that this measure was adopted, not for the purpose of changing life interests into estates of inheritance, and it is notorious that the Government have been acting on this policy latterly, and making permanent settlements.

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The object of sect. 8 of Reg. XXV. of 1802 was to secure the apportionment of rent on the division of land: *Vencataswara Yettiapah Naicker* v. *Alagoo Moottoo Servagaren* (1).

As to the policy of Reg. XXXI. of 1802, that Regulation recites that by collusion lands liable to payment of revenue have been represented as not so liable, and the Regulation was made expressly with a view to the protection of the revenue, but none of its provisions are directed against private proprietary right. And that Regulation is not mentioned in Reg. IV. of 1822, because its words are clear, and did not infringe any proprietary right. Reg. IV. of 1822 is not a repealing but an explanatory Act, and was intended to limit the generality of the terms used in the earlier Regulations. The zemindar is not a landowner in the English sense, whether the land has been permanently assessed or not. Even in *Bengal* the zemindar only has the soil subject to the customary rights of others: *Goodeve's Bengal* Full Bench Rulings, 209, 230, 278, 286; *Hunter, Orissa*, vol. ii., p. 225, 228, 236, shews how the office of poligar insensibly became hereditary with tacit recognition.

In the *Marungapuri* case (2), the evidence shews that the estate was enjoyed by father and son in succession for several generations, and if there had been any grants by the Government, the Government would have taken and must possess counterparts, but none have been produced. There was a suit in 1811, for the inheritance, which took no notice of any claim of the Government, nor is there evidence of the Government having done anything before the accession of *Terumalai* to the polliem. In the case of *Terumalai* nothing was done beyond recognition, such as would have taken place in the case of an ordinary settled estate. It is clear that the poligar himself looked upon his estate as hereditary.

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Their Lordships reserved their judgment, which was now delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

[After stating the objects and history of the suit (3), up to the time when an issue was directed to try the legitimacy of the

(1) 8 Moore's Ind. App. Ca. 327. (2) 6 Mad. H. C. Rep. 226.
(3) See p. 283, *supra*.

half-brother of the late zemindar, his Lordship proceeded as follows:—]

The case has been very elaborately and ably argued on both sides, and their Lordships having carefully considered all the Regulations and authorities which have been cited, are clearly of opinion that the decision of the High Court is correct.

It was contended by the learned counsel for the Collector Appellant that in the Presidency of *Madras* the Government had reserved to itself and had, by legislative enactments, asserted its right to all lands of every description and Reg. XXV. and XXXI. of 1802, of the *Madras* Code, were referred to as having that effect.

It was recited in the preamble of the former of those two Regulations, that the assessment of land revenue had never been fixed, and that the zemindars and others had no security for the continuance of a moderate land tax; *that for the attainment of an increased revenue it had been usual for Government to deprive the zemindars and to appoint persons on its own behalf to the management of the zemindaries, thereby reserving to the ruling power the implied right and the actual exercise of the proprietary possession of all lands whatever;* that it was obvious that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population, and wealth, and diminishing the security of personal freedom and of *private property*, and that the British Government, impressed with a deep sense of the injuries arising to the "State and to its subjects, from the operation of such principles, had resolved to remove from its administration so fruitful a source of uncertainty and disquietude, to grant to zemindars and other landholders, their heirs and successors, a *permanent property* in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which should never be liable to be increased under any circumstances."

It was then enacted by sect. 2 that, in conformity with these principles, *an assessment should be fixed on all lands liable to pay revenue to Government: and in consequence of such assessment the proprietary right of the soil should become vested in the zemindars or other proprietors of land and in their heirs and lawful successors for ever;* and it was further enacted by sect, 3, that when the condi-

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tions of the permanent settlement of the revenue should have been adjusted, a sunnud-i-milkeut & istimrar or deed of *permanent property* should be granted on the part of the British Government to all persons being or constituted to be zemindars or proprietors of land.

Laying out of consideration for the present the words of the preamble, which form no part of the enactment of the Regulation (see *Dwarris* on Statutes, p. 655), it is clear that the affirmative words of the 2nd sect. "That, in consequence of the assessment the *proprietary right* of the soil shall become vested in the zemindars, &c.," did not either give to or take away from the former owners of lands not permanently assessed any rights which they then had. It merely vested in all zemindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right (see *Coke's* 2nd Institute, p. 200; *Dwarris* on Statutes, p. 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist, except in Government, in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment.

The words "proprietors of land," as used both in the *Bengal* Code of 1793, and in the *Madras* Code of 1802, have a technical signification (see the definition in *Bengal* Reg. VIII. of 1793, sects. 5, 6, and 7; and Reg. XXVII. of 1802, *Madras* Code, sect 2). They refer to "zemindars, independent talookdars, and others who pay the revenue assessed upon their estates immediately to Government;" and the words "proprietary possession," as used in the recital of Reg. XXV. of 1802, must also be read in a similar sense as meaning the possession and rights of a proprietor in the technical sense in which that word is used, viz., the person who pays the revenue immediately to Government. (See Reg. I. of the *Madras* Code, sections 14 and 16.)

There are frequently many valuable tenures existing between the zeminder and the ryots, or actual cultivators of the land. If the Regs. XXV. and XXXI. of 1802 were to be read in the sense contended for on the part of the Collector Appellant they would have the effect of vesting in Government, not only all hereditary estates,

but all subtenures, whether for life or otherwise, and whether created by the native Governments before the territories came under the Government of the *East India Company* or not.

The words of the recital "the *implied* right and the *actual* exercise of the *proprietary possession* are, to say the least of them, very ambiguous. But whatever may be the real meaning of those words, the recital clearly was not intended to amount to more than a declaration that it had been usual for Government, in order to enforce an increased revenue, to deprive or dispossess the zemindars, and to take the management of the zemindaries into the hands of their own officers; or, in other words, that they were in the habit of taking khas possession of the zemindaries of those zemindars who neglected to pay any increased amount of revenue assessed upon them.

A similar course seems to have been adopted in *Bengal* up to the time of the permanent settlement (see Reg. I. of 1793), and to have been continued at the time of that settlement, with respect to every zemindar who might decline to engage for the jumma proposed to be permanently settled upon his estate. (See Reg. VIII. of 1793, sect. 43, *Bengal* Code.)

Further, the usage recited was limited to the purpose of obtaining an increased revenue; and it was by means of the usage that the Government was said to have reserved to itself the implied right, &c. The words are "*thereby* reserving to the ruling power, the implied right, &c." The preamble recognised the right of private property when it stated that the then existing mode of administration was injurious "*by diminishing the security of private property.*" It did not assert a right on the part of Government to deprive or dispossess zemindars in their lifetime, or their heirs after their deaths, for the purpose of transferring their rights to Government, or to new holders at the will of Government, independent of any considerations connected with the realization of revenue.

The language of the recital applied as much to zemindars in their lifetime as it did to the heirs of zemindars upon their deaths. If the words were to have the unlimited construction and effect contended for, the Regulation would have justified Government in depriving or dispossessing the deceased poligar in his lifetime, and in transferring the zeminary to a new holder, to the same extent as

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it would have justified them in dispossessing his heirs after his death. Such a construction would go far beyond the claim set up by the collector in the suit, viz., that the deceased zemindar had only a life estate which reverted to Government and was at their absolute disposal after his death; nay, it would do more, it would render every landowner in the Presidency, except those who claimed under a permanent settlement, liable to be dispossessed or deprived of his estate, and to have transferred to a new holder at the will of Government.

The preamble to Reg. XXXI. of 1802, which, as before observed, was not an enactment, is as follows:—"Whereas the ruling power of the Provinces now subject to *Fort St. George* has, in conformity to the ancient usage of the country, reserved to itself and has exercised *the actual proprietary right of lands* of every description; and whereas, consistently with principle, all alienations of land, except by the consent of the ruling power, are violations of that right; and whereas considerable portions of land have been alienated by the unauthorized encroachment of the present possessors, by the clandestine collusion of local officers, and by other fraudulent means; and whereas the permanent settlement of the land tax has been made exclusive of alienated lands of every description, it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being badshai or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose."

The Act, sect. 2, then proceeds to render valid all grants for holding lands exempt from the payment of public revenue which had been made before certain dates, and to leave to the determination of Government all doubts respecting the validity of other grants of that nature.

The words, "has reserved to itself and has exercised the actual proprietary rights of lands of every description," used in the above preamble are not precisely the same as those used in the preample of Reg. XXV., but they evidently have reference to the same usage, viz., the custom of dispossessing zemindars, and taking

their zemindaries into the khas possession of Government, for the purpose of realising the public revenue from time to time assesssed upon them. The object of the Reg. XXXI. of 1802 was merely the protection of the revenue from invalid lakiraj grants, and to provide for the mode of trying the validity of the titles of persons claiming to hold their lands exempt from the payment of revenue; it was not intended to confer upon Government any title which did not then exist. The words "alienations of land" referred not to mere transfers from one proprietor to another, but to grants for holding lands exempt from the payment of revenue. It is clear that the Regulation never intended to assert that, *according* to the usages of the country, there was no private right to lands; for, in rendering valid all lakiraj grants made prior to a certain date, and declaring that the holders should continue to enjoy the same free from the payment of revenue, there was this proviso, that the lands had not *escheated* to the State since those dates.

It was urged, in support of the collector's appeal, that there was a long course of judicial decisions, from 1813 to the present time, shewing that poligars had merely a life interest in their polliems.

The first case cited was No. 13 of 1813, 1st *Madras* Select Decrees, p. 78. In that case the Plaintiff had never had the possession of the zemindary. His claim had been repeatedly brought to the notice of Government, and had been rejected. The permanent settlement had been entered into with the Defendant, and a sunnud-i-milkeut-i-istimrar granted to him by Government, under the provisions of Reg. XXV. of 1802. This case was not decided upon the mere words of the recital of Reg XXV. of 1802, but upon the enactment in sect. 2, and it was held that the Government having *permanently* settled with the Defendant, *and granted him a sunnud*, he had acquired a title under that Regulation, and that the Plaintiff could not recover the estate. The decision, however, whether right or wrong (probably right under the law as it then stood), was decided before the passing of Reg. IV. of 1822, by which it was enacted that Regs. XXV., XXVIII., and XXX. of 1802 were not meant to define, limit, infringe, or destroy the actual rights of any description of landholders or tenants, and left them to recover in the established Courts of justice *their rights* if infringed

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(an enactment similar in effect to that contained in the *Bengal* Regulations relating to the permanent settlement in that Presidency). (See No. 8 of 1793, *Bengal* Code, sect. 30.)

Reg. IV. of 1822 expressly recognised the fact that landholders had actual rights which they might recover if infringed.

In the case cited (No. 13 of 1813), a case was referred to (Appeal No. 9 of 1813), in which a talookdar's rights were asserted and enforced against a zemindar, which is quite at variance with the contention that the property in lands of every description belonged to and was vested in Government. It is true it was stated by the Court, in No. 13 of 1813, that it was plainly deducible from Reg. XXV. of 1802 that, previously to the fixing of the permanent assessment, succession to zemindary tenures was not governed *exclusively* by the law of inheritance, but that the ruling power created, tolerated, abolished, or disposed of those tenures in such manner as might be considered most expedient for the purpose of realising the public revenue due from the lands, and that it was clear, therefore, that, in rejecting the claims of the Plaintiff, whatever might be the specific grounds of such rejection, and in granting the zemindary to the original Defendant, the British Government exercised a right which, according to the declared usages of the country, was vested in the ruling power. It was to correct opinions such as those that Reg. IV. of 1822 was passed.

The next case was No. 11 of 1846, p. 141. In that case there had not been any permanent settlement or any sunnud granted by Government. The zemindary had been made over to the father of the Plaintiff and Defendant after the district came into the possession of the *East India Company*, and it continued in his possession to the year 1811, when, upon his death, it was made over to his eldest son. The Court said that the Respondent held under a title which the Government, in the exercise of the right vested in them by the usage of the country, had conferred upon him.

One of the Judges who decided the last case was also one of those who decided No. 13 of 1813, evidently putting the same construction upon Reg. XXV. of 1802 as he had done in No. 13 of 1813.

Case No. 14 of 1817 is subject to similar remarks. The Court, of which two of the Judges were the same as those who decided the former case, acted upon similar deductions from Reg. XXV. of 1802.

All those cases were decided prior to Reg. IV. of 1822, and were probably some of the decisions which induced the Legislature to pass the Regulation.

Their Lordships do not consider that the cases cited from the *Madras* Select Decrees are binding authorities in support of the contention that Government has a right to deal with the polliem in the present case, or any other polliem, according to arbitrary will, independently of the rights of the parties, or in support of the position that the absolute right to every polliem not permanently settled is vested in Government, or that the tenure is for life only, and that upon the death of the poligar the estate reverts to Government.

Many of the cases cited in argument are of no greater weight or authority than that which is the subject of the present appeal. They are modern authorities, and there is no long uniform current of decisions sufficient to shew that every polliem not permanently settled is necessarily only a tenure for life, or at the will of Government.

In the case of *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (1), and in that of *The Collector of Madura* v. *Veeracamoo Ummal* (2), the polliems were treated as hereditary, the question in each being as to the person entitled to succeed as heir. In the latter case, the Government of *Madras* claimed to be entitled by escheat for want of male heirs, thereby admitting that the estate was hereditary; but it was held that females were not precluded from inheriting a polliem, thereby deciding that it was hereditary. It did not appear in any of those cases that the polliem had been permanently settled or that a sunnud had been granted in respect of it, under Reg. XXII. of 1802. They shew that a polliem may be hereditary though not permanently settled under Reg. XXV. of 1802.

Their Lordships are of opinion that each case must depend upon its own particular circumstances; that a polliem may be he-

(1) 9 Moore's Ind. App. Ca. 67. (2) 9 Moore's Ind. App. Ca. 446.

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ditary, and that the position laid down by the High Court is correct. They say:—

"The existence of a proprietary estate in polliems or other lands not permanently assessed, and the tenure by which it has been held, are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property."

Their Lordships are also of opinion that the finding of the High Court upon the evidence adduced that the polliem in dispute is an ancestral hereditary estate is correct.

It does not at all follow from the application made to Government for the recognition of the minor that he had not an hereditary estate. It was extremely common in *Bengal*, before the acquisition of the *Dewanny*, where a tenure was in fact hereditary from father to son, to take out a new sunnud upon each descent (*Kooldeep Narain Singh* v. *The Government and Others* (1)). So also it appears that upon a transfer of title to lands in *Calcutta*, either by alienation or descent, a fresh pottah was given to the new holder: but that was merely a fiscal regulation, and the pottah formed no part of the holder's title (*Freeman* v. *Fairlie* (2)).

The collector, in his written statement, alleged that the polliem was unsettled, and that after the death of the late zemindar the right to appoint a successor was vested in the Government, and that accordingly the Government had granted the said zemindary to the minor Defendant. No grant from the Government was produced. That which is called a sunnud was not a grant creating a new right, but a mere recognition or acknowledgment of an existing title. See the proceeding of the *Madras* Government (No. 17A, Record, p. 23).

From this document it appears that, upon the death of the late poligar, the collector sent a report to the Court of Wards, stating among other things as follows:

"The deceased zemindar, on the day previous to his death, addressed to me a petition, requesting me *to recognize* his brother as his successor to the estate, and to appoint his cousin to manage the affairs of his estate during the minority of his brother.

"The tahsildar was deputed to ascertain the wishes of the widows of the deceased on this point, and to afford information regarding the property left by the zemindar. The tahsildar submitted a statement obtained from the widows,

(1) 14 Moore's Ind. App. Ca. 256. (2) 1 Moore's Ind. App. Ca. 346.

by fire proceeding from them, though negligence on the part of the company was negatived.

It has been argued on the part of the Respondent that the case of *Fletcher* v. *Rylands* (1), decided on the relations subsisting between adjoining landowners in this country, has no application whatever to *India*. Though that case would not be binding as an authority upon a Court in *India* not administering English law, their Lordships are far from holding that, decided as it was, on the application of the maxim, *sic utere tuo ut alienum non lædas*, expressing a principle recognised by the laws of all civilised countries, it does not afford a rule applicable to circumstances of the same character in *India*—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Mahomedan law, by regulations of the *East India Company*, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of *India*. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the Government of *India*, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the Defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the Defendant in this case is in a very different position from the Defendants in *Fletcher* v. *Rylands* (1).

In that case the Defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord *Cairns* "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the Defendant appear to their

(1) Law Rep. 3 H. L. 330.

J. C. 187 — MADRAS RAILWAY CO. v. ZEMINDAR OF CARVATENAGARUM.

Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the Defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. See *Withers* v. *North Kent Railway Company* (1).

The second ground on which the Appellant relied was not so clearly stated; their Lordships understood it to be, in substance, that the Court below and the High Court estimated by a wrong standard the amount of care which the law requires of the Defendant.

It should be observed that the question of negligence was little, if at all, argued in the High Court. The Judge of the Court below quotes and applies to the case the following definition of negligence by Baron *Alderson:* "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party;" and the High Court confirm this view of the law. Without adopting every expression of the Judge of the inferior Court, their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and the appeal dismissed with costs.

Solicitors for the Appellants: *Freshfields.*
Solicitors for the Respondent: *Keen & Rogers.*

(1) 27 L. J. (Ex.) 417.

GANENDRO MOHUN TAGORE . . . . . APPELLANT;

AND

RAJAH JUTTENDRO MOHUN TAGORE, OPENDRO MOHUN TAGORE, DOORGA PERSAUD MOOKERJEE, BROOJENDRO BHOOSUN CHATTERJEE, AND CHUNDER MOHUN CHATTERJEE (TRUSTEES) . . . . . RESPONDENTS.

J. C.*
1874
June 18, 19, 20; *July* 24.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Where a devise is to determine on the devisee ceasing to use a certain house as his residence, and no manner or period of residence is prescribed, exclusive residence is not supposed to be meant; the occasional use of the house and keeping an establishment in it with the intention of again using it as a residence is a sufficient compliance with the condition.

Question raised as to what is a sufficient compliance with the condition of using a Boitokanah house as a residence.

The condition as to cesser does not arise in consequence of the devisee not using the house in any sense as his residence for four years after the testator's death, where the delay can be justified by the pendency of a suit brought to defeat his title, and by his inability to obtain possession of the whole of the house from trustees, and by the unfit state of the house for residence owing to the want of repairs, which were in progress.

THIS was an appeal from the judgment and decree of the High Court of Judicature at *Fort William*, in *Bengal*, dated the 19th of May, 1873, on a hearing before the Hon. Mr. Justice *Macpherson* and the Hon. Mr. Justice *Pontifex*, whereby it was ordered and decreed that the Appellant's suit should be dismissed with costs. The object of the suit was to have it declared that the interest of the Respondent, *Juttendro Mohun Tagore*, in the property of the late Hon. *Prosono Coomar Tagore* ceased on the 15th of January, 1869, and to obtain possession of the property for the Appellant.

The facts of the case are sufficiently set forth in the judgment. The chief question for the consideration of the Judicial Committee

* *Present:*—THE RIGHT HON. SIR JAMES W. COLVILE, THE RIGHT HON. SIR BARNES PEACOCK, THE RIGHT HON. SIR MONTAGUE E. SMITH, and THE RIGHT HON. SIR ROBERT P. COLLIER.

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was as to whether the provisions of the will of the Hon. *Prosono Coomar Tagore* (which had formed the subject of a former appeal to Her Majesty in Council) had been complied with as to the Respondent *Juttendro* using the Boitokanah house as his residence. The testator had provided that if the devisee should cease "to use, as his residence in *Calcutta*, the Boitokanah house and premises, then the devise should cease and determine." The Appellant contended that the Respondent *Juttendro* had ceased to use the house as his residence. *Juttendro*, on the other hand, contended that he had been, and now was, using it as his residence.

Another of the questions was as to whether there had not been a breach of the condition as to residence, in consequence of the Respondent not having used the Boitokanah house in any sense as a residence between the 28th of August, 1868, when the testator died, and the completion of some large repairs in October, 1872. The Respondent contended that this delay was justified by the pendency of a suit brought by the Appellant to defeat the Respondent's title altogether; by his inability to get possession of the entire house from the trustees; and by the unfit state of the house for residence owing to the want of repairs.

Mr. *Joshua Williams*, Q.C., and Mr. *Leith*, Q.C. (with them Mr. *J. D. Bell*, Mr. *Forbes*, and Mr. *Lawrence Bialé*), for the Appellant:—

In the Court below it was urged that, inasmuch as the limitations to take effect on the determination of *Juttendro's* interest had been declared to be void, the condition as to cesser also fell to the ground, and the heir could take no advantage of a breach of it. But the interest of the devisee is to cease on the cessation of residence, irrespectively of these limitations.

Then it was said that until *Juttendro* became entitled to a conveyance from the trustees on the death of the last annuitant, the condition as to cesser would not attach; that this was shewn by the fact that one of the causes of forfeiture was non-payment of the Government jumma; that this being very much more than the Rs.30,000 a year to which only *Juttendro* would be entitled before there was a surplus income, the testator could not have meant that that there should be a forfeiture in default of the

Respondent paying a very much larger sum than he was getting at the time. However, we contend that it is clear that the testator in this clause contemplated an immediate residence by the Respondent. *Juttendro* comes within the meaning of the clause, as he is a tenant for life, subject to the charge for the payment of legacies and annuities. It would clearly be defeating the object of the testator, if he might hold the house and be in the enjoyment of the rents and profits of the estate, and yet delay his residence until the last annuitant had died. What was intended was to have continuously a representative of the family at the Boitokanah house.

Thus the case is limited to the question whether or not *Juttendro* has used the Boitokanah house as his residence in *Calcutta*. He clearly has not done so. The testator did not give a mere general direction to reside there, but a particular direction to reside and to make use of the library, horses, carriages, and jewels. *Juttendro's* user of the house has been a mere colourable one.

He has slept and taken his meals always at his family house, and not at the Boitokanah; he has not given any of his entertainments at the Boitokanah. In order to reside there, it is not sufficient for him to keep his servants there, and to go there occasionally by day and transact his business there, and sometimes receive his visitors there. His intention of not residing there is, moreover, shewn by his removal from the Boitokanah to his private house of much of the furniture and the jewels; also of the plate, &c., and things connected with the state and dignity of the testator.

With regard to what constitutes residence, see *Dunne* v. *Dunne* (1); *Walcot* v. *Botfield* (2); *Rex* v. *Sargent* (3); *Wynne* v. *Fletcher* (4).

In considering the effect of the clause upon the will, reference was also made to *Sheppard's* Touchstone, p. 157.

Mr. *Forsyth*, Q.C., and Mr. *Doyne* (with them Mr. *Cowie*, Q.C.), for the Respondents:—

The limitations that were to take effect on the determination of

(1) 7 De G. M. & G. 207.
(2) Kay, 534.
(3) 5 Durn. & East, 466.
(4) 24 Beav. 430.

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Juttendro's interest have been declared to be void; consequently the condition as to cesser of the estate in the event of non-residence does not come into effect. At any rate the heir cannot take advantage of it. The words of the will expressly are, "the person next in succession to" the tenant for life "under the limitations aforesaid shall at once succeed." See *Seymour* v. *Byrne* (1).

However, we contend that there has been, in fact, no breach of the condition. From the death of the testator on the 28th of August, 1868, to the completion of the repairs in October, 1872, the Respondent, it is true, did not use the Boitokanah as his residence, but he visited the house and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it. The reasons for his not commencing his residence there during this interval are three. First, his title was not admitted; the suit was pending in which the Appellant sought to oust him altogether from the estate; it was begun in August, 1868, and not finished until July, 1872. How could he be expected to incur the expense of making that his residence when he might, after all, have been liable to be ejected? Secondly, he was unable to get possession of the entire house from the trustees; he only succeeded in doing so by a suit, which was begun in May, 1870, and finished in March, 1872. He was not bound to take violent possession. And, thirdly, the Boitokanah was wholly unfit for a residence until the completion of the necessary repairs. How could he reside in a house with cracked walls? Accordingly, in November, 1872, when this suit was commenced, there was no ground for saying that the condition for cesser was not complied with.

It is quite clear the testator could not have contemplated the clause with reference to cesser coming into operation immediately on his death. For one of the causes of cesser was non-payment of the Government revenue, and this was far more than the income which *Juttendro* at first derived from the estate. According to the contention of the Appellant, *Juttendro* would have found himself in this position: he, a tenant for life, would be obliged to pay a much larger sum to the Government than he was getting for the estate, and yet would be obliged to keep his

(1) 33 L. J. (Eq.) 690.

residence at the Boitokanah house. The intention of the testator was that the clause for cesser was to come into operation after the trusts were at an end and the donee's estate perfected by a conveyance.

The Respondent lost no time in having the Boitokanah house repaired, and since October, 1872, he has used it as his residence in the strictest sense. "Residence" is, no doubt, a vague expression. If a man keeps an establishment at a house in *England* he is said to reside there, even though he may not go there for years. With respect to a Hindu residence, we must, of course take into consideration the customs of Hindus. We must take into consideration the ordinary use of a Boitokanah house. The testator never intended that it should be used as an ordinary dwelling-house. And even if he had, enough has been done by the Respondent to enable him to say he resides there. It was sufficient for him to keep his servants and his establishment there, to go there occasionally, to transact his business there, to receive his visitors there. It was not necessary for him to sleep there, or to give his entertainments there. As regards the ladies, all the evidence shews that they could not reside there unless extensive alterations and additions were made, which would entirely change the character of the house, and make it unsuitable for the purpose of a Boitokanah. The Boitokanah is not built in such a manner as to allow a Hindu gentleman like *Juttendro*—who, as the testator knew, was a married man living with his family—to use it as a family residence; and the testator himself never used it in this way.

With regard to the furniture, &c., *Juttendro* merely removed some of the furniture and pictures from the Boitokanah temporarily for safe custody during the repairs. On the completion of the repairs they were restored, with the exception of a portion of the furniture, which was old and broken, and was consequently replaced. He has also sometimes allowed a few pictures to be removed for the purpose of being copied by his friends. And as to the jewellery and plate, he selected for his own use and retained the best, and enjoyed it according to the will of the testator, and permitted the executors to sell the remaining portion thereof.

On the question of forfeiture on ceasing to reside, see *Ridgway*

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v. *Woodhouse* (1); *Clavering* v. *Ellison* (2); *Fillingham* v. *Bromley* (3).

July 24. Their Lordships having reserved their judgment, it was now delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH :—

The questions in this appeal arise upon a clause in the will of the late Hon. *Prosono Coomar Tagore*, making provision for the cesser of the estate of the persons entitled under the limitations of the will in the event of non-residence in his Boitokanah house.

The will by which the testator devised his estates, after the determination of the life estate given to *Juttendro Mohun Tagore* (the first Respondent), to *Juttendro's* sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the Courts in *India* and in this tribunal. The final decision, speaking generally, was that the limitations in tail and subsequent limitations were contrary to Hindu law, and void, and that upon the expiration of the first life interest the Appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions. The testator expressly declared that his son, the Appellant, should take nothing under his will. He devised all his real and personal property to four trustees (of whom *Juttendro* was one) in trust to get in the personalty, with an exception thus expressed:—"Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to retain for his and

(1) 7 Beav. 437. (2) 7 H. L. C. 707.

(3) 1 T. & R. 530.

their own use." Upon trust, after paying debts and legacies, to invest the residue and pay out of the income divers annuities and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property or the profits of it. And as to the realty, upon trust, until his debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the personalty should be inadequate, and subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereinafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the will. The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establishments in the *Mofussil* and *Calcutta*," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive Rs.2500 a month, or Rs.30,000 a year. As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein.

The will, after mentioning numerous legacies and annuities, contains the specific limitations of the realty, which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a talook in *Zillah Rungpore*, subject to a jumma of of Rs40,555, and of the Boitokanah house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his "real property," and "also library, horses, carriages, farmyard, furniture of the Boitokanah, jewels, gold and silver plate, &c.," unto and to the use of *Juttendro* (the Respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows:—

"Provided always, and I hereby declare that if any devisee or tenant for life, or entail, or otherwise, or any person entitled to take as heir by descent, or adoption, or otherwise, or in any manner

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under the limitations hereinbefore contained, shall permit or suffer the said property so devised and limited, as aforesaid, or any portion thereof, to be sold for arrears of Government revenue, or shall after attaining his majority cease to keep up in a due state of repair, and to use as his residence in *Calcutta*, the said Boitokanah houses and premises where I now reside, and make use and enjoy my library, horses, carriages, farm-yard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of Government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence my said Boitokanah house, had then died."

It was contended in the former suit by the Appellant that *Juttendro's* life estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment:—

"Their Lordships read this will, alike according to its words and substance, as giving a life interest subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs.2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th of August, 1868. This suit was brought by the Appellant on the 18th of November, 1872, to have it declared that the interest of *Juttendro* had ceased by reason of his non-compliance with the clause relating to residence, and that the Appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the Bar. 1. That the limitations to take effect on the determination of *Juttendro's* interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach

of it. 2. That the condition would not attach until *Juttendro* became entitled to a conveyance from the trustees on the death of the last annuitant: and 3. That, if this were not so, there had been in fact no breach of the condition.

On the first point their Lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life interest of the Respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the Appellant would be entitled to succeed as heir.

On the second point, it was contended for the Respondent that, having regard to the other causes of forfeiture, and especially that for non-payment of the Government jumma, which far exceeded in amount the annual payment of the Rs.30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the Appellant's counsel, that the clause should be read distributively. They contended also that *Juttendro*, according to the language and substance of the decision of this tribunal, had a present life interest subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was observed that *Juttendro* had actually recovered the possession of the Boitokanah house in a suit against the trustees, so that if the Respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their Lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it, nor is it necessary for them to do so, since they agree with the judgment of the High Court in favour of the Respondent on the third point, viz., that there has been no breach, in fact, of the condition.

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Boitokanah appears to mean a house, or the part of a house, used for sitting or reception rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the Zenana, are usually the outer rooms.

The manner in which the testator himself used the Boitokanah house, is thus found by the High Court:—

"It appears from the evidence that the testator possessed a family dwelling-house as well as the Boitokanah, the two houses being completely distinct, and, indeed, situated on different sides of the same street: that some time before his wife's death he ceased to sleep in the family dwelling-house, after having complained of defective ventilation in his sleeping chamber there; that, thenceforth he slept at the Boitokanah; that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the Boitokanah; that after his wife's death he took both meals in the Boitokanah, but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the Boitokanah; that he gave his native, or strictly Hindu entertainments in his family dwelling house, and his European entertainments at the Boitokanah; that the testator's family idols were always lodged and worshipped at his family dwelling-house and never at the Boitokanah; and that, at the Boitokanah, all the affairs of his estate were conducted and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed:—

"We think it is to be gathered from the will that the testator never intended the Boitokanah to be occupied as a dwelling-house in the ordinary sense of a Hindu dwelling-house." And again, "We are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality: and we are further of opinion that such an occupation does not require that either

the occupant or the ladies of his family should sleep in the house."

Their Lordships think that, in the main, the High Court have properly construed the clause; and they understood the Appellant's counsel not to dispute this construction, but to contend that the evidence shewed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument, as to the meaning of the word "residence." The principle, if any can be said to result from them, seems to be that where in a condition of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition. In one case Lord *Eldon* seemed to think a condition imposing residence generally, was so vague that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction: *Fillingham* v. *Bromley* (1). In a case, *Rex* v *Sargent* (2), where residence was a necessary qualification for the office of bailiff of a borough, Lord *Kenyon* said:—

"It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days, or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are, "*cease to use* as his residence in *Calcutta*." It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th of August, 1868, and the Respondent did not, it would appear, use the Boitokanah in any sense as a residence, until some large

(1) 1 T. & R. 530. (2) 5 T. R. 466.

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repairs were completed in October, 1872. During this interval of time he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is, whether in the interval referred to, the Respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his counsel to justify the delay are (1), The pendency of the great suit brought by the Appellant to defeat his title altogether, which was begun in August, 1868, and finally disposed of on appeal to Her Majesty in July, 1872; (2), His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May, 1870, and ended in March, 1872; and, (3), The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the Appellant who disputed in the suit referred to the Respondent's right to possession, and would, if his suit had been successful, have ejected the Respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the Respondent did not take possession during the time covered by this litigation. But, without saying that the Appellant is estopped by his own conduct from taking advantage of the condition, their Lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The Respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their Lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an

fice when the manager was his own servant, but the inconnience to the Re[illegible]nt might be great when a clerk appointed [illegible]stalled within the precincts of the residential [illegible]ouse.

[illegible]h a stronger ground to justify the delay existed in the state of the house and its want of repair. Mr. *Allan*, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of Rs.6200. But further extensive repairs were required. The trustees having hesitated to do them, the Respondent requested *Mackintosh & Co.* to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees, with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the Respondent, who, upon this refusal, commenced in December, 1871, a suit against them, and in March, 1872, obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November, 1872, at a cost of Rs.14,000. Mr. *Allan*, the surveyor, says "the Rs.14,000 was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The Respondent entered into possession in October, 1872, before the repairs were entirely completed, and their Lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the Respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their Lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th of November, 1872, immediately after the completion of the repairs, in favour of the Respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their Lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The Respondent, who appears to adhere more strictly than the

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testator to Hindu usages, has no doubt continued to take his me[a]
and sleep in the family house, where t[he]r members of
family live; but this mode of living is not
with such a residence in the Boitokanah house as t
imposing the condition on his Hindu descendants, mus
posed to have contemplated. It appears upon the evidence tha
since the Respondent entered upon possession the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only durwans but menial servants have lived in the house. The Respondent himself frequently, if not daily, went to the house, and usually spent several hours there. It appears, also, that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception. These acts appear to their Lordships, having regard to the nature of a Boitokanah house and to Hindu usages, to amount to the use of it as a residence.

It was strongly urged by the Appellant's Counsel, that any entertainments the Respondent might give ought to take place in the Boitokanah, and it was said he had always given them at his family dwelling-house. The omission, however, to use the Boitokanah for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments, their Lordships cannot hold that the Respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the Boitokanah house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the Boitokanah to the family dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety; but the language of the condition in no way confined the use of the jewels to the residence in the Boitokanah.

Their Lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November 1872, and within twenty months from

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OUNT.] In a suit for an account it was ordered by consent of the parties that the cause should be referred to a commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of certain merchandise, or the value of such merchandise, delivered, or otherwise, with full powers for the purposes of the investigation; and that if questions of law should arise and could not be settled or disposed of before the commissioner, they were to be submitted to the Court:—*Held*, that this reference was different from the ordinary reference to a commissioner to examine accounts under Art. 181 of the *Code of Civil Procedure*.—Whether it would be competent to the Court to re-open a question of account against a clear finding upon a question of fact relating to the account and made by the commissioner upon the evidence properly before him, *quære*. WATSON *v.* AGA MEHEDEE SHERAZEE - - 346

ACCOUNT CURRENT: *See* LIMITATION. 4.

AGREEMENT BETWEEN PRINCIPAL AND AGENT: *See* LIMITATION. 4.

ALIENATION OF LANDS: *See* POLLIEM. 2; LIMITATION. 3.

ANCESTRAL PROPERTY UNDER MITHILA AND MITAKSHARA, SALE OF.] Ancestral property which descends to a man under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It is a pious duty on the part of the son to pay his father's debts, and the ancestral property in which the son, as son, acquires an interest by birth is liable to the father's debts, unless they have been contracted for immoral purposes. The Mithila law is the same. Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale. A son cannot, under the Mithila law, set aside the sale of ancestral property by his father for the discharge of the father's debt, and oust the purchaser.—Whether a son can under the Mitakshara law recover an undivided share of ancestral property sold by his father, *quære*.—A son is not entitled under the Mithila law to any interest in ancestral property sold by the father before his birth. GIRDHAREE LAL *v.* KANTOO LALL - - - 321

APPEAL, LEAVE TO: *See also* REVIEW AFTER APPEAL BROUGHT; SPECIAL LEAVE TO APPEAL.

A party who in observance of the rule of valuation prescribed by the stamp law of the country in which he sues, has paid stamp duty upon a sum lower than the appealable amount, is not thereby precluded from obtaining leave from the Courts of that country to appeal to Her Majesty in Council, if he can shew that the value of the property in dispute does reach the appealable amount. BABOO LEKRAJ ROY *v.* KANHYA SINGH [317

ARREARS OF ESTATES UNDER ATTACHMENT: *See* REVENUE SALE.

ARREARS OF REVENUE, SALE FOR: *See* REVENUE SALE; LIMITATION. 3.

ATTACHMENT: *See* REVENUE SALE. 1; MANAGER.

BONÂ FIDE PURCHASER: *See* EXECUTION SALE.

BOND: *See* CHAMPERTY.

BREACH OF CONTRACT: *See* CONTRACT; COMPROMISE.

BUTWARA: *See* MORTGAGE.

CANCELLATION OF DEED: *See* PURDAH LADY, DEED BY.

CESSER OF RESIDENCE: *See* DEVISE.

CHAMPERTY.] The Mofussil Courts of *India*, administering justice according to the broad principles of equity and good conscience, will not apply the English law of champerty and maintenance according to the practice of the English Courts, but they will consider whether a transaction impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or of litigation; and they will not allow a stranger to interfere in family affairs by an agreement between him and the real heirs that he should be entitled to a share of the estate.—Case of *Fischer* v. *Kamala Naicker* (8 Moore's Ind. Ap. Ca. 170) distinguished.—*A.*, a stranger, advanced money to enable *B.*, *C.*, and *D.*, childless Hindu widows, upon a false claim of inheritance, to take the estate of the family from *E.*, the rightful heir; *A.* got the entire control of the suit and of the affairs of *B.*, *C.*, and *D.*; and *B.*, *C.*, and *D.* exe-

CHAMPERTY—*continued.*
cuted an instrument purporting to secure to *A.* a large sum of money upon their obtaining the property, and also gave him their bond for a sum alleged to have been advanced by him.—*B.*, *C.*, and *D.* having agreed with *E.* to withdraw the suit upon terms of compromise, *E.* was induced to enter into a bond to *A.*, by which *E.* in effect engaged to pay to *A.*, in discharge of his claim upon *B.*, *C.*, and *D.*, a fixed sum, which was claimed by *A.* as the amount due to him; and *A.* agreed to abandon his claim upon them on such payment, retaining the securities he held from them until *E.*'s bond was satisfied.—At the time of entering into this bond, *E.* had only just attained his majority, was without proper counsel or assistance, and was threatened by *A.* with the consequences of not immediately acquiescing in his demand, the threats not being of bodily violence, but of carrying on the suit to his ruin; and such threats overcame his free will, and induced him, contrary to his own judgment and sense of right, and without any evidence that the sum claimed was due, to execute the bond.—On a suit by *A.* to enforce the bond:—*Held*, that the taking of the bond from *E.* did not amount to novation; that the bond was wholly invalid as against *E.*, and could not even be made to stand as a security for what might really have been advanced by *A.* to *B.*, *C.*, and *D.*, as nothing was ever due from *E.* to *A.*, and there existed no privity of contract between them. CHEDAMBARA CHETTY *v.* RENGA KRISHNA MUTHU VIRA PUCHAIYA NAICKAR - - - - 241

COLLECTORS, REPORTS OF.] Reports made by collectors, acting under Reg. VII. of 1817, of the *Madras Presidency*, are not to be regarded as having judicial authority where they express opinions on the private rights of parties; but being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded on them. RAJAH MUTTU RAMALINGA SETUPATI *v.* PERIANAYAGUM PILLAI - - - - - - 209

COMMISSIONER TO TAKE ACCOUNTS, EFFECT OF REFERENCE TO: *See* ACCOUNT.

COMPROMISE.] Immoveable property partly situated in *Rohilcund* and partly in *Oudh*, which had formerly belonged to the common ancestor of the Appellant and the Respondent, was claimed by each on the ground of heirship. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in *Rohilcund*, but not in *Oudh*, where the Respondent was, and continued, in possession. At the end of nine years from the date of the deed of compromise the Appellant sued for possession of her share of the property in *Oudh*.—The Judicial Commissioner of *Oudh* having decided that the suit was founded on the contract contained in the deed of compromise or for a breach of it, and, therefore, barred by the *Indian Limitation Act*, XIV. of 1859, s. 1, clause 10. It was *held* (reversing this decision), that the claim did not rest

COMPROMISE—*continued.*
on contract only, but on a title to the land knowledged and defined by the contract, which part only of the evidence of the Appellant prove her case, and not all her case; and consequently, the suit was not founded on contract or for a breach of it, but was a suit for the recovery of immoveable property "to which no other provision of the Act applies," and, therefore, subject only to the limitation of twelve years prescribed by s. 1, clause 12. RANI MEWA KUWAR *v.* RANI HULAS KUWAR - - 157

CONCEALMENT OF PRIOR CHARGE] A person who has represented to an intending purchaser of land that he has not a security over that land and induced him, under that belief, to buy, cannot as against that purchaser subsequently put his security in force. MUNNOO LALL *v.* LALLA CHOONEE LALL AND OTHERS - - - 1

CONDITIONAL DEVISE: *See* DEVISE.

CONDITION OF RESIDENCE, DEVISE ON: *See* DEVISE.

CONFISCATION: *See* LIMITATION. 2.

CONSTRUCTION OF MADRAS REGULATION XXV. OF 1802: *See* COLLECTOR OF TRICHINOPOLY *v.* LEKKAMANI AND OTHERS [282

CONTINUOUS ACCOUNT: *See* LIMITATION. 4.

CONTRACT: *See also* COMPROMISE.
A. held debentures of *B.*, a municipal body, and had a right to exchange them for lots of equal value, to be selected by him from building lands belonging to *B.*; the rent of which lots was to be set off against the interest on the debentures. *A.* notified to *B.* that he had selected certain lots, and asked permission to retain the debentures for a time, setting the interest against the rent. *B.* consented to *A.*'s proposal, and at the same time informed *A.* that the selected lots exceeded the value of his debentures, and that he must pay the difference. *A.* made no reply to this communication.—*A.* afterwards sued *B.* for interest on the debentures:—*Held*, that *A.* was not entitled to interest, the contract being complete, and the indication by *B.* of the difference in quantity not amounting to an introduction of a new term into the negotiation.—A correspondence between *A.* and *B.* amounted to a contract for a purchase of a future interest in immovable property:—*Held*, that such correspondence did not require registration under the *Indian Registration Act*, 1866. PORT CANNING LAND, INVESTMENT, RECLAMATION, AND DOCK CO. *v.* SMITH - - - - - 124

CONTRACT, INTRODUCTION OF NEW TERM INTO: *See* PORT CANNING CO. *v.* SMITH [124

CORRESPONDENCE, CONTRACT CONSTITUTED BY: *See* CONTRACT.

DAMAGE BY OVERFLOW OF WATER FROM TANKS: *See* TANKS.

DEBENTURES: *See* CONTRACT.

DECLARATORY DECREE: *See* PRACTICE. 3.

DECREE: *See* PRACTICE. 3; EXECUTION SALE.

DEED, CANCELLATION OF: *See* PURDAH LADEED BY.

DEED OF COMPROMISE: *See* COMPROMISE.

that date their Lordships are able to report upon this appeal to Her Majesty. This instance shews that appeals from *India*, if prosecuted with vigour, may now be speedily determined.

In the result, their Lordships will advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal, with costs.

Solicitors for the Appellant: *J. S. & A. S. Judge.*
Solicitor for the Respondent: *T. L. Wilson.*

END OF VOL. I.